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E. ROBERT SEAVER, CLER

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

NO. .....

L..... G....., INDIVIDUALLY AND AS NEXT FRIEND OF Z..... G.....

Appellant

VS

F..... O..... P.....

Appellee

ON APPEAL FROM THE COURT OF CIVIL APPEALS FOR THE FOURTH SUPREME JUDICIAL DISTRICT OF TEXAS

JURISDICTIONAL STATEMENT

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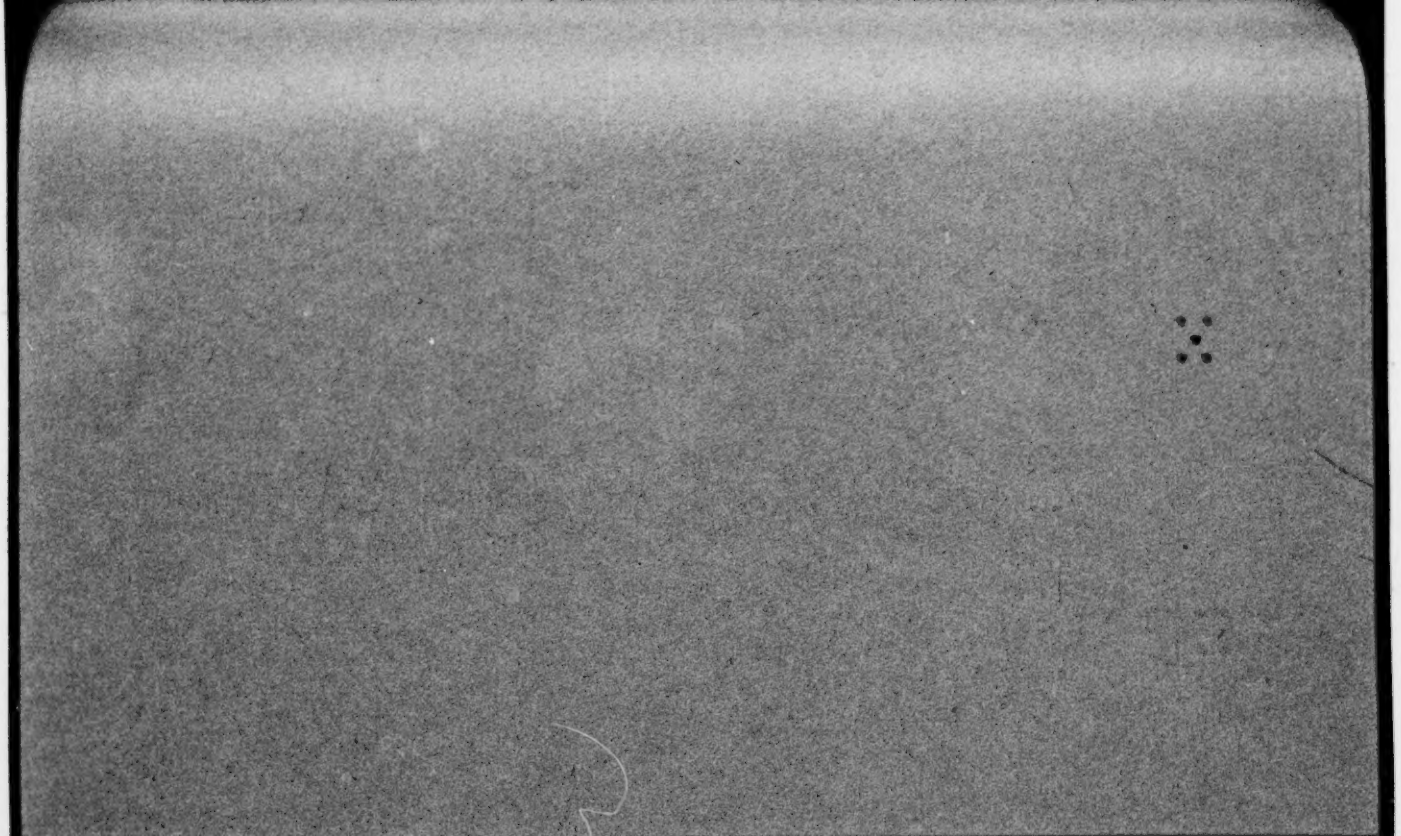

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

L..... G....., INDIVIDUALLY AND AS NEXT FRIEND OF Z..... G.....

Appellant

VS

F..... O..... P.....

Appellee

JURISDICTIONAL STATEMENT

Appellant, Linda Gomez, a twenty-four year old Mexican-American citizen, individually and as next friend of Zoraida Gomez, her two year old illegitimate daughter, appeals from the judgment of the Court of Civil Appeals for the Fourth Supreme Judicial District of Texas which was entered on March 10, 1971, rehearing denied April 7, 1971, discretionary review denied July 28, 1971, by the Supreme Court of Texas. These actions affirmed the judgment of the 150th District Court of Bexar County, Texas. Appellant submits this Statement to show that the Supreme Court of the United States has jurisdiction of this Appeal, and that a substantial constitutional question is presented.

OPINIONS BELOW

The majority and dissenting opinions of the Court of Civil Appeals for the Fourth Supreme Judicial District of Texas are reported at 466 S.W. 2d 41, and are set out *infra* at pages 18

and 21 respectively. The Court of Civil Appeals wrote no opinion in denying the Appellant's Motion for Rehearing, but its endorsement on the face of Appellant's Motion for Rehearing overruling same is set forth *infra* at page 33. The Supreme Court of Texas wrote no opinion in denying discretionary review, but its notification denying the Application for Writ of Error is found at page 34, *infra*. The 150th District Court of Bexar County, Texas, wrote no opinion but the judgment of that court is found at page 37, *infra*.

JURISDICTION

(i) Appellant brought this action in the 150th District Court of Bexar County, Texas, asking that Francisco Ocasio Perez, Appellee, be found by the court to be the natural father of Zoraida Gomez and further asking the court to order the said Francisco Ocasio Perez to pay a reasonable amount of money for the support and maintenance of Zoraida Gomez during her minority. The 150th District Court of Bexar County, Texas, in its judgment entered on April 23, 1970, found Francisco Ocasio Perez, Appellee herein, to be the father of the minor child born out of wedlock but found that there was no civil liability on the part of Appellee to support said illegitimate child.

(ii) Appellant duly appealed to the Court of Civil Appeals for the Fourth Supreme Judicial District of Texas, and that court affirmed the decision of the trial court on March 10, 1971, with Associate Justice Carlos C. Cadena dissenting. A timely application for rehearing was denied on April 7, 1971. Appellant then timely applied for Writ of Error to the Supreme Court of Texas asking for discretionary review but that Court refused the Writ finding "no reversible error" on July 28, 1971. Thus under Texas law on the 28th day of July, 1971, the judgment of the Court

of Civil Appeals became the final judgment of the highest court of the State available to Appellant. Appellant filed Notice of Appeal to the Supreme Court of the United States on August 26, 1971, with the Clerk of the Court of Civil Appeals for the Fourth Supreme Judicial District of Texas.

(iii) The jurisdiction of this Court to review by appeal the judgment of the Court of Civil Appeals for the Fourth Supreme Judicial District of Texas is conferred by 28 U.S.C. 1257 (2).

(iv) Cases which sustain the jurisdiction of this Court are:

(a) On the question of the judgment of the Court of Civil Appeals for the Fourth Supreme Judicial District of Texas being a final judgment of the highest court of Texas when the Supreme Court of Texas declines discretionary review by refusing the Application for Writ of Error finding "no reversible error": *Michigan-Wisconsin Pipe Line Co. v .Calvert*, 347 U.S. 157 (1954); *Bacon v. Texas*, 163 U.S. 207 (1896).

(b) Other cases sustaining the jurisdiction of this Court are: *Lake Erie and W. Ry. v. State*, 249 U.S. 422 (1919); *Connecticut General Life Insurance Co. v. Johnson*, 303 U.S. 77 (1938); and *Doty v. Love*, 295 U.S. 64 (1935).

(v) Appellant attacks the validity of civil statutes of the State of Texas contending they are unconstitutional insofar as they permit a legitimate child to require his father to support him while at the same time deny an illegitimate child the right to require his father to support him. The statutes together with judicial interpretation assailed herein are Section 4.02, Chapter 4 of the Texas Family Code, Vernon's Annotated Texas Statutes, and Articles 602 and 602a, Texas Penal Code, Vernon's Annotated Texas Statutes.

STATUTES INVOLVED

The statutes involved are Section 4.02, Chapter 4 of the Texas Family Code, Vernon's Annotated Texas Statutes and Article 602 and 602a, Texas Penal Code, Vernon's Annotated Texas Statutes. For the convenience of the Court the entire text of these statutes are set forth verbatin at pages 39 through 40, *infra*.

QUESTION PRESENTED

The courts of the state of Texas in construing and applying Section 4.02, Chapter 4 of the Texas Family Code, Vernon's Annotated Texas Statutes and Articles 602 and 602a, Texas Penal Code, Vernon's Annotated Texas Statutes, have ruled that there is no civil liability on the part of the natural father of an illegitimate child that would require him to contribute toward the support and maintenance of his illegitimate child as is required of the natural father of a legitimate child.

The question presented is whether Section 4.02, Chapter 4 of the Texas Family Code, Vernon's Annotated Texas Statutes and Articles 602 and 602a, Texas Penal Code, Vernon's Annotated Texas Statutes, are unconstitutional as violating the due process clause and equal protection clause of the Fourteenth Amendment to the Constitution of the United States insofar as they permit a legitimate child to require support and maintenance from his natural father while denying an illegitimate child the right to require his natural father to support and maintain him.

STATEMENT OF THE CASE

I. WHEN AND HOW THE FEDERAL QUESTION WAS RAISED AND DECIDED BELOW.

Appellant first raised the claim that Section 4.02, Chapter 4 of the Texas Family Code, Vernon's Annotated Texas Statutes and Article 602 and 602, Texas Penal Code, Vernon's Annotated Texas Statutes were invalid as applied to Appellant for the reason that the are violative of the due process clause and equal protection clause of the Fourteenth Amendment to the Constitution of the United States in the hearing on the merits of the case in the trial court. Notwithstanding Appellant's claim, the trial judge found that there was no civil liability on the part of a father to support his illegitimate child.

The same claim was again raised in Appellant's brief in the Court of Civil Appeals for the Fourth Supreme Judicial District of Texas. That court considered the issue and rejected Appellant's contention on the merits. Appellant preserved this point in her Motion for Rehearing in the Court of Civil Appeals which was denied. In her Application for Writ of Error to the Supreme Court of Texas Appellant again raised this point but the Court denied discretionary review.

II. FACTS

Appellant came before the trial court by means of a petition asking that Francisco Ocasio Perez, Appellee, be found by the court to be the natural father of Zoraida Gomez and further asking the court to order Appellee to pay a reasonable amount of child support for said illegitimate child during her minority. Appellant's petition is set forth at page 35, *infra.*

Appellant, Linda Gomez, testified that she first became acquainted with Appellee in June, 1968, at a party given by mutual

friends. At the time of their meeting, she was unmarried and Appellee told her he was also unmarried. In fact, Appellee was and remains lawfully married to someone else as of the date of the filing of this appeal. Thereafter, Appellant became intimate with Appellee and a child, Zoraida Gomez, was born of their relationship in June of 1969. The trial court found that Appellee was the natural father of Zoraida Gomez, the illegitimate child, and that Appellant was the natural mother. Further, the court found that the illegitimate child needed the support and maintenance of Appellee and that Appellee was able to give such support, and that he has refused and failed to do so. However, the trial court found that Appellee, the natural father of Zoraida Gomez an illegitimate child, has no civil liability to support said child.

THE QUESTION IS SUBSTANTIAL

This case presents the important constitutional question of whether Section 4.02, Chapter 4 of the Texas Family Code, Vernon's Annotated Texas Statutes and Articles 602 and 602a, Texas Penal Code, Vernon's Annotated Texas Statues, are unconstitutional as violating the due process clause and equal protection clause of the Fourteenth Amendment to the Constitution of the United States insofar as they permit a legitimate child to require support and maintenance from his natural father while denying an illegitimate child the right to require his natural father to support and maintain him.

Appellant raises a substantial constitutional question effecting not only herself, but also thousands of other illegitimate children.[1]

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[1]Letter of Burton G. Hackney to Harry B. Adams, III, dated May 21, 1970, a copy of which is reproduced in the Appendix hereto infra at page 41.

In short this case is of substantial importance because it involves basic rights of large numbers of individuals who are being deprived of due process and equal protection of the law by being denied paternal support through the laws of the state of Texas.

Section 4.02, Chapter 4 of the Texas Family Code, Vernon's Annotated Texas Statutes and Articles 602 and 602a, Texas Penal Code, Vernon's Annotated Texas Statutes are invalid under the due process clause and equal protection clause of the Fourteenth Amendment to the Constitution of the United States.

Appellant's sole complaint is that the Texas rule which, consistent with general governmental policy condemning children born out of wedlock to a second class way of life, deprives the illegitimate child of the right to paternal support which is accorded to legitimate children, and violates the due process clause and equal protection clause of the Fourteenth Amendment to the Constitution of the United States

Appellant contends that, in connection with support, the legislature and the courts of Texas have ignored the constitutional mandate that illegitimates "are created equal" with legitimates, have not granted them "right and opportunity," and have failed to provide them "the equal protection of the laws."

"Unequal laws" are not necessarily forbidden by the equal protection clause. The question is whether a given piece of legislation operates "equally" upon all members of a group that is defined reasonably and in terms of a proper purpose.

The law fails to provide equal protection if it either:

a. Applies only to a part of a larger group that is similarly situated in relation to the purpose of the legislation, or
b. Brings into the group some individuals who are not similarly situated.

An example of each of the above two categories is found in *Skinner v. Oklahoma*, 316 U.S. 535 (1942), where the law in question provided for sterilization of those who had committed grand larceny three times, with immunity for those who were embezzlers. It was under-inclusive in that it failed to include in the category embezzlers who were the same general type of offenders as robbers. It was over-inclusive in that not all habitual robbers are necessarily hereditary criminals.

The crucial determination to be made is whether the purpose of the grouping is proper. As stated in *Metropolitan Cas. Ins. Co. v. Brownell*, 294 U.S. 580 (1935).

> The ultimate test of validity is not whether foreing corporations differ from domestic but whether the differences between them are pertinent to the subject with respect to which the classification is made.

In Rinaldi v. Yeager, 384 U.S. 305, 308-309 (1966), this Court stated:

> The Equal Protection Clause requires more of a state law than nondiscriminatory application within the class it establishes . . . It also imposes a requirement of some rationality in the nature of the class singled out . . . . Hence, legislation may impose special burdens upon defined classes in order to achieve permissible ends. But the Equal Protection Clause does require that, in defining a class subject to legislation, the distinctions that are drawn have 'some relevance to the purpose for which the classification is made' . . . To fasten a financial burden only upon those unsuccessful appellants who are confined in state institutions, however, is to make an invidious discrimination.

The mere fact that an exclusion from the force of a law applies to all members of a law applies to all members of a class, i.e., all illegitimates, is not sufficient to satisfy the consti-

tutional requirement of nondiscrimination if illegitimacy is not in in and of itself a legitimate classification. Legislation denying to the illegitimate rights that are granted to those of legitimate birth is acceptable only if it is related to a proper public concern with respect to which legitimate and illegitimate children are not situated similarly.

The purpose of the classification is highly important. If the purpose of the classification serves no useful legitimate public purpose, it is unconstitutional. As stated in Tussman & tenBroek, "The Equal Protection of the Laws," 37 Calif. L. Rev. 341, 358 (1949).

> Viewed in this light the prohibition against discriminatory legislation is a demand for purity of motive. It erects a constitutional barrier against legislative motives of hate, prejudice, vengeance, hostility, or, alternatively, of favoritism, and partiality. The imposition of special burdens, the granting of special benefits, must always be justified. They can only be justified as being directed at the elimination of some social evil, the achievement of some public good. When and if the proscribed motives replace a concern for the public good as the purpose of the law, there is a violation of the equal prohibition against discriminatory legislation.

In cases involving economic interests, this Court has generally put the burden on those contesting the constitutionality of state law. *Lindsley v. Natural Carbonic Gas Co.*, 220 U.S. 61, 78-79 (1911). However, where the "basic civil rights of man" are concerned, the burden is manifestly changed. *Skinner v. Oklahoma, supra.* Mr. Justice Douglas, speaking for the Court, said in *Harper v. Virginia Board of Elections*, 383 U.S. 663, 669-670 (1966):

> In determining what lines are unconstitutionally discriminatory, we have never been confined to historic notions of

> equality, any more than we have restricted due process to a fixed catalogue of what was at a given time deemed to be the limits of fundamental rights. Notions of what constitutes equal treatment for purposes of the Equal Protection Clause *do* change . . . . We have long been mindful that where fundamental rights and liberties are asserted under the Equal Protection Clause, classifications which might invade or restrain them must be closely scrutinized and carefully confined.

Some classifications, such as those based on race or ancestry are constitutionally suspect and subject to the most rigid scrutiny, and may only be utilized if there clearly appears some overriding statutory purpose or compelling justification. *McLaughlin v. Florida*, 379 U.S. 184 (1964); *Oyama v. California*, 332 U.S. 633, 640 (1948); *Bolling v. Sharpe*, 347 U.S. 497, 499 (1954); *Korematsu v. United States*, 323 U.S. 214, 216 (1944); *Hirabayashi v. United States*, 320 U.S. 81, 100 (1943).

The law is well established that the color of a person's skin is not a proper or reasonable classification. *Shelley v. Kraemer*, 334 U.S. 1 (1948). Nor according to well acquainted authorities in the domestic relations field, is illegitimacy. As stated by Professor Harry D. Krause in an excellent and thorough treatise entitled "Equal Protection for the Illegitimate," 65 Mich. L. Rev. 477 at 489:

> There is no difficulty in establishing 'state action' as a source of the discrimination against illegitimates. While much of the bastard's problem may result from private discrimination, there is no doubt that it is state action when the illegitimate child does not inherit under the intestacy laws, when his statutory right of support is either non-existent or limited, or when he does not qualify under welfare laws.

The same author states at page 504 of this article:

> Fortunately for the illegitimate, his case for equal protection is strongest in the areas which are of the greatest practical

importance to him. While few illegitimates would gain from a provision for inheritance rights under the intestacy laws, many would beneft from an enlarged right of support.

As Justice Cadena observed in his dissent in the court below:

> . . . when a classification created by law is called into question, 'if any state of facts reasonably can be conceived that would sustain it, the existence of that state of facts at the time the law was enacted must be assumed.' *Lindsley v. Natural Carbonic Gas Co.*, 220 U.S. 61, 79 (1911), 55 L. Ed. 369, 31 S. Ct. 337. Even under this approach, which requires the exercise of maximum judicial self-restraint, the classification here under attack can be upheld only by freeing the judicial imagination to wander vagrant and unconfined, and indulging the naive assumption that by relieving a man of his obligation to support his illegitimate children, the law encourages him to withhold his sexual favors from women who are not willing to marry him. This assumption has no basis in human experience. If this fantasy is discarded, one must conclude that the discrimination against bastards with respect to the right to paternal support has its bases in prejudice rather than reason. 466 S.W. 2d 41 at 46 *infra* at 28.

We submit that illegitimacy is a "condition" and that there is discrimnation in Texas based on this "condition." A case involving "outcasts" is *Preisler v. Calcaterra,* 243 S.W. 2d 62 (Mo. 1951). The Supreme Court of Missouri, sitting en banc. held that the equal rights and equal protection clauses of the federal and state Constitutions made invalid a statute which arbitrarily limited to the two political parties the right to have challengers and watchers at the polls, and denied the right to the Socialist Party. We suggest that if the "outcasts" among political parties were entitled to equal protection with other political parties, the "outcasts" of the human race should be entitled to equal treatment with their more favored brethren, at least so far as the law of support by a father is concerned. In *Harper v. Virginia Board*

of Elections, supra, this Court in holding the Virginia poll tax invalid, stated: "Voter qualifications have no relationship to wealth nor to paying or not paying this or any other tax". Can it not be said just as effectively, children's qualifications for support have no relation to whether or not their father bothered to get a marriage license.

The basic unfairness of such discrimination is made manifest when it is realized that it is not only a discrimination against the illegitimate child, but is also a discrimination in favor of a legitimate child. For instance, if a father has a legitimate child and an illegitimate child, and the father must support only the legitimate child, the former will have a headstart in life by reason of better education, better social standing and a better supply of the necessities of life. Can there be any legal or moral reason why the illegitimate child, who had nothing to do with the circumstances of his birth, should be put in an inferior position in these matters by the law of the state of Texas? By stating that "all persons are created equal," is not the United States Constitution stating that all new born babies are in the same classification regardless of circumstances of their birth?

It seems clear that if about one third of the "poor" are illegitimate and thereby subject to discrimination under state and federal law, improving their social position depends at least in part upon a change in these laws. Krause, "Equal Protection for the Illegitimate," 65 Mich. L. Rev. 506. The same author observed in another article that:

> Aside from the public aspects of illegitimacy, however, another battle is in progress in the private sector. Here, the purpose is to provide to the illegitimate those private resources that ought to be available to give him an even start in life. These resources are his parents, especially his father. *Bringing the Bastard into the Great Society — A Proposed Uniform Act on Legitimacy.* Harry D. Krause, 44 Tex. L. Rev. 829.

The recent decision of this Court in *Levy v. Louisiana*, 391 U.S. 68 (1968) bears great similarity to the issues in this case. In the *Levy* case five illegitimate children filed suit in Louisiana district court for the wrongful death of their mother pursuant to the Louisiana wrongful death statute. The district court denied the relief sought holding that the wrongful death statute only authorized actions in behalf of legitimate children.

On appeal, this Court, in an opinion by Mr. Justice Douglas expressing the views of six members of the Court, held that since the illegitimacy of the children's birth had no rational relation to the nature of the wrong allegedly inflicted on their mother by the defendants, and since it was invidious to discriminate against the children where no action, conduct, or demeanor of theirs was possibly relevant to the harm that was done their mother, the equal protection clause of the Fourteenth Amendment was violated by denying them the right to maintain an action for their mother's wrongful death.

A portion of the language of this opinion is particularly appropriate at this point. *Levy, supra* at 71.

> In applying the equal protection clause to social and economic legislation, we give great latitude to the legislature in making classifications . . . . Even so, would a corporation, which is a 'person' for certain purposes within the meaning of the equal protection clause . . . be required to forego recovery for wrongs due its interest because its incorporators were all bastards?
>
> . . . . Legitimacy or illegitimacy of birth has no relation to the nature of the wrong allegedly inflicted on the mother. These children, though illegitimate, were dependent on her; she cared for them and nurtured them; they were indeed hers in the biological and in the spiritual sense; in her death they suffered wrong in the sense that any dependent would. We conclude that it is invidious to discriminate against them

when no action, conduct or demeanor of theirs is possibly relevant to the harm that was done the mother.

If the reason for the classification in question is to prevent or preclude illegitimacy, then the force and focus of the law is directed at the wrong class of people. The illegitimate child has no control over his illegitimacy. He cannot prevent his own illegitimacy and when he passes puberty he becomes a member of another class of people. The class he now belongs to is a protected class and is unlike his former status of dependency. Now he is a member of a class whose inclination to breed illegitimate children is unfettered by any sanction or compulsion to do the right thing.

A companion case of *Levy v. Louisiana, supra,* was *Glona v. American Guarantee and Liability Insurance Company,* 391 U.S. 73 (1968). This case involved an action by a mother for the wrongful death of her illegitimate son; the United States District Court for the Eastern District of Louisiana granted the defendant's motion for summary judgment on the ground that Louisiana's wrongful death statute, while authorizing actions by the mother of legitimate children, did not authorize actions by the mother of illegitimate children.

Mr. Justice Douglas, expressing the views of six members of this Court, held that where the plaintiff in a wrongful death action is plainly the mother of the decedent, the State denies equal protection of the laws by withholding relief merely because the plaintiff's child, though wrongfully killed, was born to the plaintiff out of wedlock.

Since the opinions of this Court in *Levy* and *Glona, supra,* the Supreme Court of Missouri has considered and decided the very issue before this Court. This is especially important when one considers that *only* Texas, Idaho and formerly Missouri deny

an illegitimate child the support of his father. Note, St. Mary's Law Journal, Volume 1, page 146. In the case of R..... v. R ....., 431 S.W. 2d 152 (Missouri, 1968) the court held that illegitimate children have a right equal to that of legitimate children to require support by their father.

In the recent decision of this Court in *Labine v. Vincent*, ... U.S. ..... 28 L. Ed 2d 288, (March 29, 1971), Justice Black expressing the views of five members of the Court held that Louisiana's statutory scheme barring an illegitimate child, who had been acknowledged but not legtimated, from sharing equally with the legitimate heirs in the father's estate, had a rational basis in view of the State's interest in promoting family life and directing family life and the disposition of property within the State. This Court thus ruled that such statutory scheme did not constitute an invidious discrimination against illegitimate children in violation of the due process and equal protection clause of the Fourteenth Amendment.

This case is clearly distinguishable from the case at bar because as Justice Black points out in the Court's decision:

> We emphasize that this is not a case like Levy where the state has created an insurmountable barrier to this illegitimate child. ..... U.S. ....., 28 L. Ed. 288 at 294.

Here the state of Texas has created an "insurmountable barrier" to this illegitimate child because the State is denying the child the very sustenance necessary to pass without chaos and hardships from birth to adulthood. Nothing is more necessary for a child than support and maintenance by his father.

If the purpose of denying an illegitimate child the right to compel his natural father to support him when he is in need and want is to prevent moral decay or sin, then this is not an

accomplishment of that purpose. For every man knows, that under the laws of the state of Texas, he may spawn through and seed the entire State but if he does so without benefit of marriage, he is not responsible for the effects of his fecundity. It must fall to the burden of the State at large through its welfare agencies to take care of his responsibilities, for someone must care for a child in need.

How then is society protected if society must bear the burden of supporting the illegitimate child? We submit that the protection afforded by these laws is geared solely toward the individual malfactor and does not protect society at large. The law certainly does not protect the illegitimate child.

If the purpose and ends of the law and decisions of the courts are to punish the illegitimate child, then this must be viewed as an intolerable situation. The illegitimate is punished for an act over which he had no control, an act committed patently before his birth, and an act committed not by him but by two other people.

Appellant has attempted to raise very briefly the important constitutional issues presented by this case. Respectfully the Appellant wishes to direct the attention of the Court to the dissenting opinion of Associate Justice Carlo C. Cadena in the court below found at 406 S.W. 2d 43 and *infra* at page 21. Justice Cadena's opinion states Apellant's position in a precise and forceful manner. Appellant urges the Court to consider Justice Cadena's opinion as a part of this Statement for all purposes.

CONCLUSION

For the reasons stated, jurisdiction should be noted.

Respectfully submitted,

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APPENDIX

MAJORITY OPINION OF THE COURT OF CIVIL APPEALS FOR THE FOURTH SUPREME JUDICIAL DISTRICT OF TEXAS

L ..... G..... , Individually and As
Next Friend of Z..... G.....,
Appellant,

No. 14917, v.
F..... O..... P.....,
Appellee.

Appeal from Bexar County.

This is an appeal from a judgment declaring appellee to be the father of Z ..... G....., a minor child born out of wedlock, but decreeing that there is no civil liability on the part of appellee to support such child.

The only testimony in the record was by the mother of such child, who testified that she was unmarried when she met appellee at a party and had subsequently dated him; that as a result of this dating, a child had been born; that there is no doubt in her mind that appellee is the father of the child; that appellee is a married man, but that at the time of such dating, she did not know this. Appellee had legal representation in the early proceedings, and an answer was filed on his behalf, consisting of a general denial, and a plea in abatement asserting that no cause of action exists either by statutory or common law in Texas for the support of a minor child born out of wedlock.[1] Appellee's

1. Establishment of paternity is a prerequisite to allowing the court to establish a relationship between the child and the father upon which the illegitimate child could base his claim to support. The

attorney was given leave to withdraw as counsel prior to the trial of said cause, an appellee did not appear in said trial, either personally or by attorney.

Appellant asserts that such judgment denying such child the support of her father constitutes a denial of equal protection of law under the Fourteenth Amendment of the United States Constitution, and Article 1, Section 3, of the Texas Constitution, and is an unconstitutional discrimination contrary to law.

At common law, the father is under no legal obligation for the support and maintenance of his illegitimate children. Lane v. Philips, 69 Tex. 240, 6 S.W. 610 (1887); Beaver v. State, 96 Tex. Crim. 179, 256 S.W. 929 (1923); 10 Am. Jur. 2d Bastard Sesc. 68; 10 C.J.S. Bastards Sec. 18, page 86. The majority of the courts in this country have held that without legislation on the subject, the father of illegitimate child cannot be required to provide for its support. 30 A.L.R. Anno.—Illegitimate—Duty to Support 1069; 10 Am. Jur. 2d Sec. 68, supra; 10 C.J.S. Sec. 18, supra.

At the present time there is no Texas statute imposing on the father the duty to support and maintain an illegitimate child. We do not consider it the purpose of this opinion to debate the various sociological reasons for or against such legislation. Sufficient to say, the Family Law Section of the State Bar of Texas has recommended such legislation to both the 61st and 62nd Legislatures of the State of Texas. At the present time all but two states have such legislation. It must be recognized, however, that a

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Texas Constitution and the Texas Statutes nowhere provide for a "bastardy proceeding" to establish the paternity of the father. An act patterned after the Uniform Act on Legitimacy was submitted to the 61st Legislature in 1969; however, such proposed act did not become law. Such act would have established procedures for determination of paternity and provided for support of an illegitimate child. See Senate Bill No. 281; University of Texas; Krause, Proposed Uniform Act on Legitimacy, 44 Tex. L. Rev. 829 (1966); Mullin, Constitutional Law, 1 St. Mary's Law Journal 146, 149-150 (1969).

dominant feature of any type of legitimation statutes is the provision for proper standards and safeguards for determining the paternity of an illegitimate child.

The Texas Courts have uniformly held that a father is not under a common law or statutory duty to support his illegitimate child. See Lane v. Philips, supra; Beaver v. State, supra; 8 Tex. Jur. 2d Bastardy Sec. 13. The Supreme Court in Home of Holy Infancy v. Kaska, 397 S.W. 2d 208 (Tex. 1965), has recently reconsidered at length the rights and standing of the father of an illegitimate child. It was there said: "There are no similar statutes (legitimation) in Texas, and here a father is not under a common law or statutory duty to support his illegitimate child." In the face of this positive holding by our Supreme Court, the cases from other jurisdiction have little, if any, application. However, such holdings must be considered in the light of whether or not such jurisdiction has enacted some type of legitimation statute.

The trial court properly held that there was no cause of action in this State to impose civil liability on the part of appellee to support such illegitimate child. The judgment of the trial court is affirmed.

FRED V. KLINGEMAN
Associate Justice

Opinion delivered and
filed March 10, 1971

DISSENTING OPINION OF THE COURT OF CIVIL APPEALS FOR THE FOURTH SUPREME JUDICIAL DISTRICT OF TEXAS

L G , Individually and As
Next Friend of Z G ,

Appellant,

No. 14917, v.

F O P ,

Appellee.

Appeal from Bexar County.

Appellant's sole complaint is that the Texas rule which, consistently with the general governmental policy of condemning children born out of wedlock to a second class way of life, deprives an illegitimate child of the right to paternal support which is accorded to legitimate children, violates the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution. The majority opinion notes appellant's contention and then proceeds to ignore it by applying, without effort to defend, the very rule of laws which appellant assails as unconstitutional.

Perhaps there was a time when the contention here made by appellant could be relegated to that class of arguments which courts consider too frivolous to merit discussion. But, at least during the past decade, there has been an increased concern with the validity, under the Equal Protection Clause, of governmental policies which discriminate against bastards.[1] Consideration of

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[1]Note, " 'Suitable Home' Tests Under Social Security: A Functional Approach to Equal Protection," 70 Yale L. J. 1192 (1961 is one of the earliest attempts to analyze classification based on legitimacy in the light of the Equal Protection Clause. The problem is discussed in Foote, Levy & Saunders, Cases on Family Law 72 (1966). Apparently,

the problem increased after the May 20, 1968, decisions by the Supreme Court of the United States in Levy v. Louisiana, 391 U.S. 68, 20 L. Ed. 2d 436, 88 S. Ct. 1509, and Glona v. American Guarantee and Liability Insurance Co., 391 U.S. 73, 20 L. Ed. 2d 441, 88 S. Ct. 1515, invalidating classifications based on illegitimacy found in a wrongful death statute[2]. Neither Levy nor Glona is mentioned by the majority.

Levy struck down the provisions of the Louisiana wrongful death statute which denied to a child born out of wedlock recovery for the wrongful death of his mother. In Glona, the Court invalidated a provision of the same statute which deprived a woman of the right to recover for the wrongful death of her illegitimate child.

Admittedly, the actual holdings in Levy and Glona do no more than equalize the position of legitimate and illegitimate children *vis-a-vis* their mother insofar as wrongful death claims against tortfeasors are concerned. The extension of the Levy and Glona decisions to eliminate all distinctions between legitimate and

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the first court to take note of the equal protection argument was the Supreme Court of Washington. After interpreting the Washington wrongful death statute as granting to both legitimate and illegitimate children to recover for the wrongful death of a parent, the court said: "Significantly, a very persuasive argument can be made that a decision contrary to ours would deny Appellant's daughter her Fourteenth Amendment right to equal protection of the laws, since there is no valid social reason, for purposes of welfare legislation, for distinguishing between members of the class 'illegitimate children' and other members of the broader class 'children' to which members of the more narrow class belong." Armijo v. Wesselius, 440 P. 2d 471, 474 (1968). The "very persuasive argument" referred to by the Washington Court is found in the article by Professor Krause, Equal Protection for the Illegitimate, 65 Mich. L. Rev. 477 (1967).

[2]Krause, Legitimate and Illegitimate Offspring of Levy v. Louisiana—First Decision on Equal Protection and Paternity, 36 U. of Chi. L. Rev. 338 (1969); Gray & Rudovsky, The Court Acknowledges the Illegitimate: Levy v. Louisiana and Glona v. American Guarantee and Liability Ins. Co., 118 U. of Pa. L. Rev. 1 (1969); Comment, The Expanding Rights of the Illegitimate, 3 Creighton L. Rev. 135 (1970); Note, 21 Case W. Res. L. Rev. 292 (1970); Note, 54 Minn. L. Rev. 1336 (1970); Note, 44 Tul. L. Rev. 640 (1970).

illegitimate children in their relation with their mother is difficult to avoid and would work no significant alteration of the Texas law.[3]

However, the extension of Levy[4] to the relationship between an illegitimate child and his father would bring about profound changes in the status of the out-of-wedlock child, since most of the legal disadvantages under which such a child labors result from his legal relations, or, more precisely, the lack of such relations, with his father. But we are not here concerned with the validity of all rules regulating the relationship between a father and his illegitimate child. We need consider only the right to paternal support, which is, perhaps, the most important of the rights which the Texas law grants to a legitimate child and denies to a bastard. A denial of the right to paternal support has a greatly more serious effect on a child than does, for example, a denial of the right to bear his father's name.

Interestingly enough, the Supreme Court of Louisiana, on remand of Levy from the United States Supreme Court, assumed that the decision was not limited to the mother-child relationship.[5]

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[3]In Texas, such an interpretation of Levy and Glona apparently would work no substantial change in any of the important relations of an illegitimate child to his mother. In this state, the mother is entitled to custody of such a child and has the duty to support it. Even before the Levy decision, the Texas courts had held that a child born out of wedlock is entitled to recover for the wrongful death of his mother. American General Ins. Co. v. Alexander, 216 S.W. 2d 997 (Tex. Civ. App.—Beaumont 1948, writ ref'd). For the purposes of inheritance, an illegitimate child "shall be treated the same as if he were the legitimate child of his mother . . ." Tex. Prob. Code Sec. 42. Despite early statements to the effect that the term "children," as used in our workmen's compensation statutes, embraced only legitimate children, it is now held that an illegitimate child may recover compensation benefits for the death of his mother. 6 Tex. Jur. 2d, Workmen's Compensation, Sec. 58, p. 602.

[4]Only the Levy decision involved the rights of an illegtimate. Glona involved the rights of the mother of a child born out of wedlock. It is, therefore, believed that Levy is the more pertinent of the two decisions.

[5]Levy v. State of Louisiana, 216 So. 2d 818, 820 (1968).

With reference to the precise question before us, the highest courts of Ohio and Missouri have reached contradictory results.

The Ohio Supreme Court, by a 4-3 decision, concluded that Levy applied solely to "the intimate, familial relationship which exists between a mother and her child, whether the child is legitimate or illegitimate." Baston v. Sears, 15 Ohio St. 2d 166, 239 N. E. 2d 62, 63, n.* (1968). The Baston majority felt that a rule denying the right to paternal support to illegtimiate was merely a recognition of the nature of the obligation undertaken by the father at marriage. The marriage contract was viewed as including the promise by the husband to support the legitimate issue of the union. An illegitimate child, therefore, cannot claim a right of support against his father who has not consented to be bound. 239 N. E. 2d at 63-64.

The decision of the Missouri Supreme Court on the same question differs from that of the Ohio Court not only in the result reached, but also in the lack of dissent. The unanimous conclusion was simply stated: "The principles applied by the United States Supreme Court would render invalid state action which produces discrimination between legitimate and illegitimate children insofar as the right of the child to compel support by his father is concerned." R..... v. R....., 431 S.W. 2d 152, 154 (1968).

Apparently, the only other cases in which the highest court of a state has considered the problem of paternal support since the Levy decision is Munn v. Munn, 450 P. 2d 68 (1969, Colo.). There, the statute providing for the support of an illegitimate child by his father contemplated a judgment awarding damages against the father. The judgment in such a case was a final judgment, not subject to subsequent modification upon a showing of changed financial conditions. Since, under Colorado law, the father of a legitimate child has the right to reopen the case for the purpose of

having the amount lowered to reflect changed financial conditions. It was held that the denial of a similar right of the father of an illegitimate child was a denial to such father of the equal protection of the laws. By way of dictum, the Colorado Supreme Court added that the statute was equally objectionable from the viewpoint of the illegitimate child "for the jury verdict freezes his right to support from his father at a fixed level without regard to changing financial needs on his part." 450 P. 2d at 69.

It may be conceded, as the majority opinion here asserts, that it is not the purpose of that opinion "to debate the various sociological reasons for or against" the adoption of bastardy statutes. But, in view of the contention pressed upon us by appellant ,we cannot escape the task of analyzing the governmental purpose which is supposedly promoted by the rule which discriminates against illegitimate in the matter of the right to paternal support. When a state law is challenged under the Equal Protection Clause, the critical question concerns the existence of a rational nexus between the classification adopted and a valid governmental objective.[6] The issue is not whether the State of Texas may create a class composed of children born out of wedlock and subject the members of that class to less favorable treatment than that accorded to

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[6]"But classification must be reasonable, not arbitrary, and must rest upon some ground of different having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike." Royster Guano Co. v. Virginia, 253 U. S. 412, 415 (1920), 64 L. Ed. 989, 40 S. Ct. 560. See generally, Tusman & tenBroek, The Equal Protection of the Laws 37 Calif. L. Rev. 341, 345-346 (1949).

The suggestion that a law is immune to constitutional attack if it applies equally to all persons within the statutory class has been rejected. "Judicial inquiry under the Equal Protection Clause, therefore, does not end with a showing of equal application among the members of the class defined . . ." McLaughlin v. State of Florida, 379 U. S. 184, 191 (1964), 13 L. Ed. 2d 222, 85 S. Ct. 283. Consequently, the fact that the Texas law deprives all illegitimate children of the right to paternal support is irrelevant to the consideration of the equal protection problem.

legitimate children, but whether there is a rational connection between such disparate treatment and the promotion of a legitimate governmental interest.[7] If the majority's unwillingness to "debate" implies that equal protection problems can be solved without discussion of the purpose, sociological or otherwise, which prompted placing of the members of a class in a legally disadvantageous position, then this Court today announces a novel approach to problems involving the Equal Protection Clause. To refuse to discuss the purpose of a discriminatory rule is to refuse to consider the claim of constitutional right.

The traditional arguments advanced in justification of laws discriminating against illegitimate children can be simply stated. It is said that the discrimination promotes morals and the general welfare because it (1) encourages marriage and deters extra-marital sexual relations; (2) prevents disruption of the family unit; and (3) allows a father to choose whether or not he will recognize the child.[8] It cannot be denied that the promotion of these ends is a legitimate governmental objective. But the problem here is whether the State of Texas has chosen a constitutional method of pursuing an undoubted state interest.

Even if we assume, closing our eyes to the soaring illegitimate birth rate, that a woman will refrain from illicit sexual activity in order to avoid bearing a child who will be denied paternal support, there is no basis for the conclusion that the Equal Protection Clause permits resort to this practice of vicarious expiation.[9] Nor can it be seriously contended that the governmental purpose of promoting

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[7]Tussman & tenBroek, op. cit., supra, n. 6, at 346.

[8]See Krause, Equal Protection for the Illegitimate, 65 Mich. L. Rev. 477, 491-98 (1967). The Louisiana court in Levy emphasized the interest of the state in discouraging out-of-wedlock births and encouraging marriage. Levy v. State, 192 So. 2d 193, 195 (La. Ct. App. 1966).

[9]Krause, Equal Protection and Paternity, 36 U. of Chi. L. Rev. 338, 347, n. 34 (1969).

marriage and discouraging sexual promiscuity is promoted by a rule which guarantees to the rake immunity from liability for the support of the children born as a result of his extra-marital copulative performances.

The argument that compelling a man to support his illegitimate offspring would tend to destroy the family is singularly unpersuasive. There is nothing to indicate that the 48 states which have imposed such obligation on an illegitimate father have experienced a disruption of the family institution to an extent greater than the two states, including Texas, which deny the right to paternal support to illegitimates. The specious nature of the family protection argument is laid bare by the fact that freedom from the support obligation is not limited to married men. The same immunity is extended to illegitimate fathers who have no family to protect.

If preservation of the family unit is, indeed, the purpose of discrimnation against illegitimates in the matter of support, it is strange that the state shows no concern whatever for the stability of the legitimate family of the illegitimate mother, on whom the States of Texas places the obligation of support.[10]

It will be recalled that the Ohio court justified the difference in the support obligation owed by a man to his legitimate and illegitimate children on the theory that the legitimate father assumes, as an incident of the nuptial contract, the obligation to support the children of the marriage. Under the "consent" theory, the right of a legitimate child to paternal support is apparently a contractual right which he asserts as a third party beneficiary of the marriage contract.

The notion that a father is bound to support his legititimate children solely because he consents to do so assumes that children

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[10]May the illegitimate mother complain that she is denied the equal protection of the laws because her obligation to her illegitimate child are substantially greater than those imposed on the man who was her partner in the socially disapproved procreative act?

owe their right to support to the existence of marriage. In fact, marriage owes its existence to the necessity that children be supported.[11] The fictitious nature of the consensual nature of the father's support obligation is apparent. The obligation to support legitimate children would exist even if the man, during the marriage ceremony, expressly stated, with the full acquiescence of the bride, that he did not assume such obligation. If such a repudiation is ineffective, then consent is irrelevant. "Implied consent," then, is a misnomer. The obligation is imposed by law, irrespective of consent.

It is recognized that when a classification created by law is called into question, "if any state of facts reasonably can be conceived that would sustain it, the existence of that state of facts at the time the law was enacted must be assumed." Lindsley v. Natural Carbonic Gas Co., 220 U. S. 61, 79 (1911), 55 L. Ed. 369, 31 S. Ct. 337. Even under this approach, which requires the exercise of maximum self-restraint, the classification here under attack can be upheld only by freeing the judicial imagination to wander vagrant and unconfined, and indulging the naive assumption that by relieving a man of his obligation to support his illegitimate children, the law encourages him to withhold his sexual favors from women who are not willing to marry him. This assumption has no basis in human experience. If this fantasy is discarded, we must conclude that the discrimination against bastards with respect to the right to paternal support has its basis in prejudice rather than reason.[12]

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11 I Westermark, History of Human Marriage, 72 (1921).

12 "The bastard, like the prostitute, thief and beggar, belongs to that motley crowd of disreputable social types which society has generally resented, always endured. He is a living symbol of social irregularity, and undesirable evidence of contra-moral forces; in short, a problem as old and involved as human existence itself." Davis, Illegitimacy and the Social Structure, 45 Am. J. of Sociology 215 (1939).

The classification here is characterized by a general illsuitedness to the advancement of any proper governmental interest. It is highly adaptable to uses which are oppressive in the sense of systematic and unfair devaluation of the claims of certain persons to substantial equality of treatment. It possesses a potency to injure and stigmatize the disadvantaged class by implying popular or official belief in their inherent inferiority or undeservedness. It penalizes a class of persons solely because of conditions which are wholly beyond their control and which result from the conduct of third parties occurring before the penalized persons came into existence. These are the hallmarks of "invidious" discrimination.

The opinion by the Texas Supreme Court in Home of Holy Infancy v. Kaska, 397 S.W. 2d 208 (1965), does not support the refusal by this Court to consider appellant's equal protection contention. Kaska contains no discussion of the constitutional problem, and the opinion in that case precludes the inference that the highest tribunal of this state had its attention called to the equal protection question.

The fact that Texas has not adopted a bastardy statute is not pertinent. In fact, it is the policy of the state in depriving illegitimates of the right to paternal support which explains appellant's presence here. Nor is it true that it "must be recognized . . . that a dominant feature of any type of legitimation statutes is the provision for proper standards and safeguards for determining the paternity of an illegitimate child." The Texas legitimation statute contains no such provisions. "Where a man, having by a woman a child or children shall afterwards intermarry with such woman, such child or children shall thereby be legitimated and made capable of inheriting his estate." Tex. Ann. Prob. Code Sec. 42. No procedure is established for the purpose of determining whether a man who marries a woman who has conceived and given birth to a child out of wedlock is, in fact, the father of the child. In any event, a constitutional right is not dependent for its existence on state

action establishing a specific procedure for the ascertainment of the facts on which the constitutional claim is based. The vagaries of local practices cannot be allowed to prevail over a constitutional right. Gouled v. United States, 255 U. S. 298, 313 (1921), 65 L. Ed. 647, 41 S. Ct. 261. If an illegitimate child has a constitutional right to paternal support, then, under Article 1, Sec. 13 of the Texas Constitution, the legislature is powerless, either by affirmative action or by failure to act, to destroy his cause of action by depriving him of a forum. Middletin v. Texas Power & Light Co., 108 Tex. 96, 185 S.W. 556 (1916).

The difficulty of ascertaining paternity, in the absence of the strong presumption of legitimacy in the case of a child born in wedlock, presents no obstacle to recognition of the claim of an illegitimate child. The fact that recognition of a right may lead to the assertion of groundless charges is not a sufficient reason for refusing to recognize the existence of the right. Relief, of course, will be granted only in those cases where paternity is established.[13] Here, the trial court found as a fact that appellee is the father of the child in question. Appellee has not challenged the sufficiency of the evidence to support this finding.

CARLOS C. CADENA
Associate Justice

Dissenting Opinion filed
and delivered March 10, 1971

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[13]The approach that recovery will be denied in the absence of proof but will be granted in the presence of proof has been denounced as being "altogether too simplistic." Jerry Vogel Music Co. v. Edward B. Marks Corp., 425 F. 2d 834, 836, n. 4 (2d Cir., 1969). Cf: "It is . . . to be observed that the argument against allowing such an action because groundless charges may be made is not a good reason for denying recovery. If the right to recover for injury resulting from the wrongful conduct be defeated whenever such dangers exist, many of the grievances the law deals with would be eliminated. That some claims may be spurious should not compel those who administer justice to shut their eyes to serious wrongs . . . ." It is the function of courts and juries to determine whether claims are valid or false. This responsibility should not be shunned merely because the task may be difficult to perform." Samms v. Eccles, 11 Utah 2d 299, 358 P. 2d 344, 347 (1961).

APPELLANT'S NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

NO: 14,917

IN THE COURT OF CIVIL APPEALS FOR THE FOURTH SUPREME JUDICIAL DISTRICT OF TEXAS

L..... G....., INDIVIDUALLY AND AS NEXT FRIEND OF Z..... G.....,

Appellant

VS

F..... O..... P.....,

Appellee

NOTICE OF APPEAL

TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES:

Notice is hereby given that, Linda Gomez, individually and as next friend of Zoraida Gomez, appellant in the above styled cause, hereby appeals to the Supreme Court of the United States from the final order and opinion of this Court rendered on March 10, 1971, and from final order of the Supreme Court of Texas of July 28, 1971, refusing Application for Writ of Error, finding no reversible error

This appeal is taken pursuant to 28 United States Code Section 1257 (2).

Respectfully submitted,

HARRY B. ADAMS, III
DONNIE J. MCMANUS
Attorneys for Appellant
203 West Nueva Street
San Antonio, Texas 78207

By /s/ .....

CERTIFICATE OF SERVICE

I, Harry B. Adams, III, one of the attorneys for the appellant, and a member of the Bar of the Supreme Court of the United States hereby certify that on the 26th day of August, 1971, I served a copy of the foregoing Notice of Appeal on the appellee, by depositing a copy in the United States Mail, First Class, Certified, Return Receipt Requested, postage prepaid, addressed to Francisco Ocasio Perez, Company B, 1st Bn. 41 Inf. Mech., Fort Hood, Texas. Therefore all parties have been served.

/s/

HARRY B. ADAMS, III
Attorney for Appellant

FACE OF APPELLANTS MOTION FOR REHEARING IN THE COURT OF CIVIL APPEALS FOR THE FOURTH SUPREME JUDICIAL DISTRICT OF TEXAS, ON WHICH APPEARS NOTATION OF THE COURT OVERRULING SAID MOTION.

NO: 14,917

14917

IN THE COURT OF CIVIL APPEALS FOR THE
FOURTH SUPREME JUDICIAL
DISTRICT OF TEXAS

LINDA GOMEZ, INDIVIDUALLY AND AS
NEXT FRIEND OF ZORAIDA GOMEZ,
Appellant

B-2719
A2380 VS.

FRANCISCO OCASIO PEREZ,
Appellee

APPEAL FROM THE DISTRICT COURT
ONE HUNDRED FIFTIETH JUDICIAL DISTRICT
OF BEXAR COUNTY, TEXAS

Overruled
S.V.K.
CWB.

APPELLANT'S MOTION FOR REHEARING

FILED
In the Court of Civil Appeals
AT SAN ANTONIO, TEXAS

MAR 22 1971

Robert L. Cook
CLERK

HARRY B. ADAMS, III
ROYAL K. GRIFFIN
203 West Nueva Street
San Antonio, Texas 78207
(512) 227-0111

Attorneys for Appellant

NOTIFICATION FROM THE SUPREME COURT OF TEXAS REFUSING WRIT OF ERROR, "NO REVERSIBLE ERROR"

CLERK'S OFFICE—SUPREME COURT

Austin, Texas, July 28, 1971

Dear Sir:

You are hereby notified that the Application for Writ of Error in the case of GOMEZ v. PEREZ, No. B-2719, was this day refused. No reversible error.

Very truly yours,

GARSON R. JACKSON, Clerk

PLAINTIFF'S ORIGINAL PETITION
TRIAL COURT

NO. F-215903

LINDA GOMEZ, individually and as next friend of ZORAIDA GOMEZ	IN THE DISTRICT COURT 150th JUDICIAL DISTRICT
VS.	BEXAR COUNTY, TEXAS
FRANCISCO OCASIO PEREZ	

PLAINTIFF'S ORIGINAL PETITION

TO THE HONORABLE JUDGE OF SAID COURT:

Now comes the plaintiff, Linda Gomez, individually and as next friend of Zoraida Gomez, complaining of the defendant, Francisco Ocasio Perez, and respectfully shows the Court the following:

I.

Plaintiff, Linda Gomez, and Zoraida Gomes are actual bona fide residents of San Antonio, Bexar County, Texas. Defendant, Francisco Ocasio Perez, is a resident of San Antonio, Bexar County, Texas, and may be served with citation at Fort Hood, Killeen, Texas where he is a Sergeant.

II.

Plaintiff would show the Court that Francisco Ocasio Perez is the natural father and that she Linda Gomez is the natural mother of Zoraida Gomez, who was born June 13, 1969, in Bexar County, Texas. Plaintiff would also show that said child was conceived in San Antonio, Bexar County, Texas.

III.

Plaintiff, Linda Gomez, would show the Court that she is a proper person to have the care, custody and control of said minor child, Zoraida Gomez, and that she is in great want and need and without means to adequately support said minor child and that the defendant should be required to pay not less than $50.00 per week for the support of said minor child.

WHEREFORE, PREMISES CONSIDERED, plaintiff prays that defendant be cited to appear and answer herein as provided by law and that upon the hearing of this case on its merits that the defendant be declared to be the father of Zoraida Gomez, a female born June 13, 1969; that she the plaintiff, Linda Gomez, be awarded the care, custody and control of said child, Zoraida Gomez; that defendant be declared legally obligated to support said minor child and that defendant be ordered to pay a reasonable amount of support and maintenance for the minor child; plaintiff further prays for such other relief both general and special in law and in equity to which she may show herself justly entitled.

LINDA GOMEZ—Plaintiff

HARRY B. ADAMS, III
Attorney for Plaintiff
203 West Nueva Street—3rd Floor
San Antonio, Texas 78207

FILING: FILED
ELTON R. CUDE
DISTRICT CLERK, BEXAR CO., TEXAS
1969 SEP 18 PM 4:02
DEPUTY
BY MOLLIE OVIEDO

FINAL JUDGMENT OF THE TRIAL COURT
NO: F-215,903

LINDA GOMEZ,
INDIVIDUALLY AND
AS NEXT FRIEND OF
ZORAIDA GOMEZ
VS
FRANCISCO OCASIO PEREZ

IN THE DISTRICT COURT
150th JUDICIAL DISTRICT
BEXAR COUNTY, TEXAS

FINAL JUDGMENT

On this the 23rd day of March, 1970, came on to be heard the above styled and numbered cause, came the plaintiff in person and by her attorney, and the defendant, although duly and timely notified of this hearing by service upon his attorney, failed to appear. The Court after considering the notice to the defendant found that it was duly and timely given and in accordance with all legal requirements, and proceeded to hear the case on the merits. The Court after hearing the pleadings read, the evidence and the arguments of plaintiff's attorney, finds that this Court has jurisdiction to hear this suit, that Linda Gomez is the mother and Francisco Ocasio Perez, the defendant herein, is the father of Zoraida Gomez; that Zoraida Gomez was born out of wedlock, that at the time Zoraida Gomez was conceived through the present time Francisco Ocasio Perez was not married to Linda Gomez but was married to another person. The Court further finds that Zoraida Gomez needs the support and maintenance of her father but that the defendant though able to furnish such support has failed and refused to do so. The Court further finds there is no civil liability on the part of a father to support an illegitimate child.

Is it therefore ORDERED, ADJUDGED and DECREED by the Court that the relief sought herein is in all things denied.

To which judgment of the Court plaintiff duly and timely in open Court gave notice to appeal.

SIGNED this 23rd day o April, 1970.

Judge Presiding

APPROVED:

HARRY B. ADAMS, III
Attorney for Plaintiff
203 W. Nueva Street
San Antonio, Texas 78207

ENTRY: Recorded in Volume 117A, at pages 223 and 224 Minutes of the 150th Judicial District Court

RENDERED: April 23, 1970

ARTICLES 602 and 602A, VERNON'S ANNOTATED PENAL CODE

Desertion of wife or child

Any husband who shall wilfully desert, neglect or refuse to provide for the support and maintenance of his wife who may be in necessitous circumstances, or any parent who shall wilfully desert, neglect or refuse to provide for the support and maintenance of his or her child or children under eighteen years of age, shall be guilty of a misdemeanor, and upon conviction, shall be punished by confinement in the County Jail for not more than two years. As amended Acts 1959, 56th Leg., p. 504, ch. 222, Sec. 1.

Subsequent convicted for desertion of wife or child; leaving state

Any husband who has been convicted of the misdemeanor offense of deserting, neglecting or refusing to provide for the support and maintenance of his wife who may be in necessitous circumstances, or any parent who has been convicted of the misdemeanor offense of deserting, neglecting, or refusing to provide for the support and maintenance of his or her child or children under eighteen years of age, and who shall thereafter wilfully desert, neglect or refuse to provide for the support and maintenance of his or her child or children under eighteen years of age, shall for each and every subsequent such violation be guilty of a felony; any husband who shall wilfully desert, neglect, or refuse to provide for support and maintenance of his wife who may be in necessitous circumstances, or any husband who shall wilfully desert, neglect, or refuse to provide for the support and maintenance of his child or children under eighteen years of age, and who shall desert said wife or children by leaving the State of Texas and by going into some other state, shall be guilty of a felony; and upon conviction shall be punished by

confinement in the County Jail not less than ten days nor more than two years, or by confinement in the State Penitentiary for not more than five years. Added Acts 1595, 56th Leg., p. 504, ch. 222, Sec. 1.

SECTION 4.02, CHAPTER 4, OF THE TEXAS FAMILY CODE

Duty to Support

Each spouse has the duty to support his or her minor children. The husband has the duty to support the wife, and the wife has the duty to support the husband when he is unable to support himself. A spouse who fails to discharge a duty of support is liable to any person who provides necessaries to those to whom support is owed.

LETTER OF BURTON G. HACKNEY TO HARRY B. ADAMS, III, DATED MAY 21, 1970

APPENDIX

STATE DEPARTMENT OF PUBLIC WELFARE

...
...
...ILLSBORO
...ALL BAKER
...MAN, HOUSTON
...SARAZAN
...ON, FORT WORTH

BURTON G. HACKNEY
COMMISSIONER

HERBERT C. WILSON
DEPUTY COMMISSIONER

JOHN H. REAGAN BUILDING

AUSTIN, TEXAS 78701

May 21, 1970

...Harry Adams
...torney at Law
...ar County Legal Aid Association
...W. Nueva
...Antonio, Texas 78207

RE: Amicus Curiae Brief

...r Mr. Adams:

...your telephone call to Miss Lane requesting the Department to consider the possi...ity of asking the Attorney General to write an Amicus Curiae Brief for the Depart...t in the suit involving the establishment of paternity and securing of support on...alf of children born out of wedlock, you also requested some statistical data.

...are enclosing a copy of our letter to the Honorable Crawford Martin, Attorney ...eral. You will note from your copy of that letter we are asking that you supply, ...ectly to his office, the style and status of your case and whatever additional ...rmation he may need. We are also furnishing you the tabulation as to the number ...families, number of children, and amounts of payments in the AFDC program for the ...lve months beginning May, 1969 through April, 1970.

...do not have available information which will show the amount of assistance paid o...alf of illegitimate children. However, in November, 1967, an AFDC study was made ...ch showed that 23.8% of the children on the rolls were illegitimate.

...quarterly tabulation (A-337) from Automatic Data Processing for the month ending ...ch 31, 1970, shows 52,136 or 28.8% illegitimate children. This is the number of ...ldren with the code for unmarried parent entered on Forms 1-A and 1-B.

...trust that this information will be of some assistance to you.

Sincerely yours,

Burton G. Hackney

...eel
...closures
...Honorable Crawford C. Martin

MAY 31 1972

NO. 71-978

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1971

LINDA GOMEZ, ET AL.,

Petitioners

v.

FRANCISCO G. PEREZ,

Respondent

On Application for Writ of Certiorari to the United States Supreme Court from the Supreme Court of Texas

MEMORANDUM FOR THE STATE OF TEXAS AS AMICUS CURIAE

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NO. 71-575

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1971

LINDA GOMEZ, ET AL.,

Petitioners

v.

FRANCISCO O. PEREZ,

Respondent

On Application for Writ of Certiorari to the United States Supreme Court from the Supreme Court of Texas

---

MEMORANDUM FOR THE STATE OF TEXAS AS AMICUS CURIAE

This memorandum is submitted pursuant to the Court's invitation of March 13, 1972.

The Petitioners are a mother and her illegimate child who sought to have the natural father declared as the father of the illegitimate child by the 150th Judicial District Court of Bexar County, Texas, in addition to making an award for child support payments. The trial court found the Respondent, the alleged natural father, was in fact the father of the Petitioner child but that such child was born out of wedlock. Based upon these findings, the trial court denied the request for child support payments on the grounds that in Texas there exists no civil liability on the part of a father to support an illegitimate child.

In the case of *L. G., et al. v. F. O. P.*, 466 S.W.2d 41 (Tex. Civ. App. 1971, writ ref., n.r.e.), the Court of Civil Appeals affirmed the decision of the trial court. The Supreme Court of Texas subsequently refused to grant an application for writ of error with the notation that there was no reversible error. The Petitioners have now appealed to this Court and seek the granting of their writ of certiorari.

While not wishing to debate the sociological and economic arguments advanced by Petitioners to justify requiring the natural father of an illegitimate child to assume the burden of support of such child, amicus curiae is of the opinion that in this case such a decision is one which must be determined in legislative halls rather than by judicial fiat. Consequently, the decision rendered by the court below should be either affirmed or certiorari denied. Such a decision would neither offend nor conflict with this Court's previous decisions in *Levy v. Louisiana,* 391 U.S. 68, 88 S.Ct. 1509, 20 L.Ed 2d 436 (1968); *Glona v. American Guaranty and Liability Ins. Co.,* 391 U.S. 73, 88 S.Ct. 1515, 20 L.Ed.2d 441 (1968); *Labine v. Vincent,* 401 U.S. 532 (1971); or *Weber v. Aetna Casualty & Surety Co.,* 40 L.W. 4460 (April 24, 1972).

In Texas, the natural father of an illegitimate child is under neither a common law nor statutory duty to support his illegitimate children. *Home of the Holy Infancy v. Kaska,* 397 S.W.2d 208 (Tex. 1966); *Lane v. Phillips,* 69 Tex. 240 (Tex. 1887); *Beaver v. State,* 96 Tex. Crim. 179, 256 S.W. 929 (1923). Whether this long recognized principle in the jurisprudence of the State of Texas is to join the rapidly swelling ranks of those statutes and legal decisions of Texas and other states invalidated by the ever growing and proliferating demands of the Equal Protection Clause of the

Fourteenth Amendment to the Constitution of the United States, necessitates an examination of those cases in this area commencing with *Levy*.

Levy was an action on behalf of minor illegitimate children for the wrongful death of their mother. The children had sued to recover under a Louisiana statute, and the Louisiana courts had held that "child" in the wrongful death statute meant "legitimate child". The appeal to the United States Supreme Court was based upon the contention that such a result constituted a violation of the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the Constitution of the United States. *Glona* was a companion case involving the same facts with the exception that it was an action to recover by the mother for the wrongful death of an illegitimate child. Footnotes in the case of *Levy v. Louisiana* reveal that under Louisiana law both parents are under a duty to support their illegitimate children.

The court in *Levy v. Louisiana* stated that:

> "The rights asserted here involve the intimate, familial relationship between a child and his own mother. When the child's claim of damage for loss of his mother is an issue, why, in the terms of 'equal protection', should the tort feasors go free merely because a child is illegitimate? . . .
>
> ". . .
>
> "We conclude that it is invidious to discriminate against them when no action, conduct, or demeanor of theirs is possibly relevant to the harm that was done the mother."

In *Glona* this Court applied the same reasoning as in *Levy*, but of interest is this Court's statement, or possible warning, in its opinion that:

"Opening the courts to suits of this kind may conceivably be a temptation to some to assert motherhood fraudulently. That problem, however, concerns burden of proof. *Where the claimant is plainly the mother,* the state denies equal protection of the laws to withhold relief merely because the child, wrongfully killed, was born to her out of wedlock." (Emphasis added.)

The foregoing statement is significant in the present case because Petitioner would have this Court venture into that new area where parenthood is not so readily proved or disproved.

Whether the decision in *Levy* and *Glona* would be extended beyond the relationship between the mother and the illegitimate child so as to include relationships involving the father was most interestingly commented upon by the court in the case of *Jerry Vogel Music Co. v. Edward B. Marks Music Corp.,* 425 F.2d 834 (2nd Cir. 1969), where in the opinion it was held that:

"Plaintiff pretermits what an enthusiast over *Levy* characterizes as 'the interesting question... whether it will be extended to the father-child relationship,' with what is considered the pleasant result of invalidating 'hundreds of state statutes and several federal laws' [footnote — Krause, Legitimate and Illegitimate Offspring of Levy v. Louisiana—First Decisions on Equal Protection and Paternity, 36 U. Chic. L. Rev. 338, 339 (1969)]—not to speak of the common law rule in force when the Fourteenth Amendment was adopted. The highest courts of Ohio and Missouri have reached differing results concerning the illegitimate child's right to paternal support, Boston v. Sears, 15 Ohio St. 2d 166, 239 N.E.2d 62 (1968); R—— v. R——, 431 S.W.2d 152 (Mo. 1968); cf. Munn v. Munn, 450 P.2d 68 (Colo. 1969). In Schmoll v. Creecy, 54 N.J. 194, 254 A.2d 525 (1969), the Supreme Court of New Jersey refused, in the light of Levy to follow a direction in

the state's wrongful death statute keying recovery to those entitled to take by intestacy when that course would have ruled out illegitimate children of a father. The effect of *Levy* and *Glona* in cases of actual intestacy of the father, which *De Sylva* held to be the closest parallel to the forced succession of the Copyright Act., seems not yet to have been directly decided by the highest court of any state. But see In re Estate of Jensen, 162 N.W.2d 861, 877-879 (N.J. 1968); Succession of Bush, 222 So.2d 642 (La. Ct. App. 1969); Strahan v. Strahan, 304 F.Supp. 40 (W.D. La. Sept. 22, 1969).

"We find it unnecessary to attempt to forecast whether the Supreme Court will differentiate between the situations of the father and of the mother [footnote—We do suggest, however, that the differences in the problem of proof are not to be minimized. As any lawyer with experience in defending against claims of relationship advanced long after the critical date would vividly realize, it is altogether too simplistic to say 'Recovery should be denied in the absence of proof, but granted in the presence of proof.' See Krause, supra, 36, U. Chic. L. Rev. at 344]."

Before discussiong *Labine* and *Weber,* it would seem that this Court has already indicated its reluctance to extend the decision in *Levy* and *Glona* beyond the facts presented in such cases. *Levy* and *Glona* were decided on May 20, 1968, and less than a month later, on June 17, 1968, this Court rendered its decision in the case of *King v. Smith*, 392 U.S. 309 (1968). This case dealt with whether the "substitute father rule" of the State of Alabama, in connection with its operation of the AFDC Program (Aid to Families With Dependent Children) was in conflict with the provisions of the Social Security Act and the Constitution of the United States. The court in its decision based its decision upon the Social Security Act rather than constitutional

grounds in deciding that the Alabama rule was invalid. However, it is interesting to note in the concurring opinion in *King* an attempt was made to base the decision upon the reasoning of the court in *Levy,* but apparently the majority of the court did not desire to so extend the doctrine of *Levy.* This becomes even more important when one considers and studies the facts actually before the court in *King.* In Alabama, only legitimate children are entitled to support from their parents. If the doctrine of *Levy* was intended by this Court to be extended to the relationship between an illegitimate child and its natural father, then the result reached in *King* would have been decidedly different. The court in its decision in *King* stated that:

> ". . . Whether the substitute father is actually the father of the child is irrelevant. It is also irrelevant whether he is legally obligated to support the child, and whether he does in fact contribute to their support . . .
>
> ". . .
>
> ". . . In other words, the state argues that since in Alabama the needy children of married couples are not eligible for AFDC aid so long as their father in in the home, *it is only fair that children of a mother who cohabits with a man not her husband and not their father be treated similarly.* The difficulty with this argument is that it fails to take account of the circumstances that children of fathers living in the home are in a very different position from children of mothers who cohabit with men not their father; *the child's father has a legal duty to support him, while the unrelated substitute father, at least in Alabama, does not. We believe Congress intended the term 'parent' in §§406a of the Act, 42 U.S.C. §§606(a), to include only those persons with a legal duty of support.*
>
> ". . .

"The question for decision here is whether Congress could have intended that a man was to be regarded as a child's parent so as to deprive the child of AFDC eligibility despite the circumstances: (1) that the man did not in fact support the child; and (2) that he was not legally obligated to support the child.

". . .

". . . On the question of whether the man must be legally obligated to provide support before he can be regarded as a child's parent, the State has no such cogent answer. We think the answer is quite clear: Congress must have meant by the term 'parent' an individual who owed to the child a State-imposed legal duty of support.

". . .

". . . We think it apparent that neither Congress nor any reasonable person would believe that providing employment for some man who is under no legal duty to support a child would in any way provide meaningful economic security for that child." (Emphasis added.)

Had this Court, in its decision in *King,* felt that the decision in *Levy* gave the right to an illegitimate child to obtain support from his natural father, it would have been necessary for the court to reach a different decision as to a certain class of AFDC recipients. If the illegitimate child's father is alive and is under an obligation to support such child, by an extension of the decision in *Levy,* then this might well result in the child and the mother being ineligible for AFDC benefits regardless of whether the illegitimate child's father is actually supporting the child. Undoubtedly this Court did not wish to reach this result and consequently must have rejected the view of extending the doctrine of *Levy* suggested by the concurring opinion. Unless such

interpretation is given to the later decision in *King*, then the interpretation sought by Petitioners for the extension of *Levy* would require the reversal of *King*, or in the alternative would result in many present AFDC recipients being declared ineligible for such benefits.

In *Labine* this Court had before it an attack against certain statutes governing intestate succession that barred an illegitimate child from inheriting or sharing in its father's estate. This Court in upholding the validity of such statutory enactments specifically declined to extend the *Levy* and *Glona* rationale into an area to which it felt it did not apply. As amicus curiae is of the opinion that *Labine* is controlling in the instant case, notice should be taken of the statements found in this Court's opinion which limited further expansion of *Levy* and *Glona:*

> ". . . . The cause of action alleged in Levy was in tort. It was undisputed that Louisiana had created a statutory tort . . . so that a large class of persons injured by the tort could recover damages . . . . Under those circumstances the Court held that the State could not totally exclude from the class of potential plaintiffs illegitimate children who were unquestionably injured by the tort . . . . Levy did not say and cannot be fairly read to say that a State can never treat an illegitimate child differently from legitimate offspring . . .
>
> ". . .
>
> ". . . Absent a specific constitutional guarantee, it is for that legislature, not the life-tenured judges of this Court, to select from among possible laws. We cannot say that Louisiana's policy provides a perfect or even a desirable solution or the one we would have provided for the problem of the property rights of illegitimate children. Neither can we say that Louisiana does not have the power

to make laws for distribution of property left within the State.

We emphasize that this is not a case, like Levy, where the State has created an insurmountable barrier to this illegitimate child. There is not the slightest suggestion in this case that Louisiana has barred this illegitimate child from inheriting from her father . . . ." (Emphasis added.)

In the present case, as in *Labine,* there is no insurmountable barrier to the illegitimate child obtaining support from its natural father. The father could, as mentioned in *Labine,* legitimate the child by marrying the mother; the father could voluntarily undertake to support the child; and the father could even legally become liable for the care of the illegitimate child if he has assumed these responsibilities. *Franks v. Franks,* 138 S.W. 1110 (Tex. Civ. App. 1911, writ ref.).

As this Court concluded in *Labine,* there is nothing in the vague generalities of the Equal Protection and Due Process Clauses which would empower this Court to nullify the deliberate choices of the elected representatives of the people of Texas or the judicial determinations of the Texas courts as to the common law rule to be followed within its boundaries.

This now brings us to the recent decision of this Court in *Weber* where certain limitations upon recovery by illegitimate children under the workmen's compensation laws of Louisiana were under attack. This Court, in holding invalid the provision challenged, felt that *Levy,* rather than *Labine,* was the applicable precedent to follow in the case before it. However, the very language of *Weber* discloses that *Labine,* rather than *Weber* or *Levy,* should be controlling and the applicable precedent in the case now under consideration. This Court stated in its opinion that:

". . . in Labine the intestate, unlike deceased in the present action, might easily have modified his daughter's disfavored position . . . The burdens of illegitimacy, already weighty, become doubly so when neither parent nor child can legally lighten them . . .

". . .

". . . the state interest in minimizing problems of proof is not significantly disturbed by our decision. . ."

The foregoing statements which weigh most heavily in this Court's decision to apply *Levy* rather than *Labine* would be hardly applicable in the present case. There does not exist the insurmountable or difficult barrier to the illegitimate child receiving support from its natural father. In turn, to follow *Levy* in this case would be to trigger a potential torrent of litigation to establish paternity where matters of proof or disproof are significantly difficult and uncertain. This becomes especially critical when there exists no common law precedent within the jurisprudence of the State of Texas to either determine paternity, or such ancillary issues as support, visitation rights, and the like, and the Legislature has chosen, to date, not to exercise its exclusive right to enact statutory provisions which would offer guidelines.

The foregoing is especially true in view of the language of this Court in *McDonald v. Board of Election Commissioners of Chicago,* 394 U.S. 802, 89 S.Ct. 1404, 22 L.Ed.2d 739 (1969), where it was stated that:

". . . A legislature traditionally has been allowed to take reform 'one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind,' Williamson v. Lee Optical of Oklahoma, In., 348 U.S. 483, 489, 99 L.Ed. 563, 573, 75 S.Ct. 461 (1955); and a legis-

lature need not run the risk of losing an entire remedial scheme simply because it failed, through inadvertence or otherwise, to cover every evil that might conceivably have been attacked."

Such cases as *Dandridge v. Williams,* 397 U.S. 471, 90 S.Ct. 1153 (1970), set forth that the Fourteenth Amendment gives to the federal courts no power to impose upon the states their views of what constitutes wise economic or social policy. Perhaps it would be wise to view this position with the warning of the dissent in *Reynolds v. Sims,* 377 U.S. 533 (1964), that not every major social ill in this country can find its cure in some constitutional principle. To attempt to cure all real or imagined inequities by innovative judicial expansion of the Fourteenth Amendment is to deprive the legislative branch of government of its very reason for existence or to create some form of competitive arena in which the separation of power doctrine is ignored and wild races are run to see which branch of government comes up with the best political solution.

CONCLUSION

For the foregoing reasons the State of Texas, as amicus curiae, is of the opinion that the courts below were correct in their judgments, from which Petitioners seek certiorari to this Court, and consequently certiorari should be denied, or in the alternative that the judgment below be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Pat Bailey, Assistant Attorney General, and one of the attorneys for the State of Texas as amicus curiae, hereby certify that copies of the foregoing amicus curiae memorandum have been mailed to Mr. Harry B. Adams III and Mr. Melvin N. Eichelbaum, 203 West Nueva Street, San Antonio, Texas 78207, on the 30th day of May, 1972.

PAT BAILEY

AUG 7 1972
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

NO: 71-575

L..... G....., INDIVIDUALLY AND AS NEXT FRIEND OF Z..... G.....,

APPELLANTS

VS

F..... O..... P.....,

APPELLEE

ON APPEAL FROM THE COURT OF CIVIL APPEALS FOR THE FOURTH SUPREME JUDICIAL DISTRICT OF TEXAS

APPELLANTS' BRIEF ON THE MERITS

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ARGUMENT:

I. The right to seek and obtain paternal support, a significant element of a child's right to life from which the bastard has been historically barred, is an important right that Texas law has persistently granted to a legitimate child, but denied to an illegitimate child, solely because of the fortuitous circumstances surrounding his birth, circumstances patently beyond his control 9

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A. The dichotomy which Texas law applies to children, by denying the illegitimtae child the right to seek and obtain paternal support, is invidious discrimination without any valid State purpose, and thereby contravenes the equal protection clause 13

B. The placing of the burden of support of the illegitimate child wholly on the female parent has no rational relationship to a valid State purpose, and thereby constitutes an invidious discrimination in contradiction to the equal protection clause 19

III. The State's creation of a legal barrier which prevents an illegitimate child from seeking and obtaining paternal support, is arbitrary and capricious, bearing no real or substantial relation to the avowed State purpose, and hence denies the illegitimate his right to due process under the Fourteenth Amendment to the United States Constitution 21

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

NO: 71-575

L..... G....., INDIVIDUALLY AND AS NEXT FRIEND OF Z..... G.....,

APPELLANTS

VS

F..... O..... P.....,

APPELLEE

ON APPEAL FROM THE COURT OF CIVIL APPEALS FOR THE FOURTH SUPREME JUDICIAL DISTRICT OF TEXAS

BRIEF FOR APPELLANTS

OPINIONS BELOW

The majority and dissenting opinions of the Court of Civil Appeals for the Fourth Supreme Judicial District of Texas are reported at 466 S.W. 2d 41, and the full texts of which are respectively contained at pages 45 through 48 and pages 49 through 58 of the Record.

The Court of Civil Appeals wrote no opinion in denying the Appellants' Motion for Rehearing, but its endorsement on the face of Appellants' Motion for Rehearing overruling same is set forth at page 38 of the Record. The Supreme Court of Texas wrote

no opinion in denying discretionary review, but its notification denying the Application for Writ of Error is found at page 4 of the Record. The 150th District Court of Bexar County, Texas, wrote no opinion but the judgment of that Court is found at page 112 through 113 of the Record.

JURISDICTION

Appellants present this matter to the Supreme Court on appeal from the decision of the Court of Civil Appeals for the Fourth Supreme Judicial District of Texas. That decision affirmed the holding of the District Court of Bexar County, 150th Judicial District, in which the validity of certain statutes of the State of Texas were upheld in spite of the contentions of appellants that the said statutes are repugnant to the United States Constitution.

The decision of the Fourth Court of Civil Appeals was dated March 10, 1971. Further review in the Court of Civil Appeals was refused on April 7, 1971, at which time the Court overruled Appellants' application for rehearing.

Appellants then filed a timely application for Writ of Error to the Supreme Court of the State of Texas. That Court, on the 28th day of July, 1971, refused the Writ, finding "no reversible error". Therefore, under Texas law, on the 28th day of July, 1971, the decision of the Court of Civil Appeals became the decision of the highest Court of the State of Texas to which Appellants could present their contentions.[1]

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1. On the question of the judgment of the Court of Civil Appeals for the Fourth Supreme Judicial District being a final judgment of the highest Court of Texas when the State Supreme Court declines discretionary review by refusing the Application for Writ of Error finding "no reversible error," see the following cases: **Bacon v. Texas,** 163 U.S. 207 (1896); **Sullivan v. Texas,** 207 U.S. 416 (1908); **San Antonio & A.P.R. Co. v. Wagner,** 241 U.S. 476 (1916). For other cases sustaining the jurisdiction of this Court see: **Lake Erie and W. Ry. v. State,** 249 U.S. 422 (1919); **Connecticut General Life Insurance Co. v. Johnson,** 303 U.S. 77 (1938); and **Doty v. Love,** 295 U.S. 64 (1935)."

Accordingly, on the 26th day of August, 1971, Appellants filed Notice of Appeal to the Supreme Court of the United States with the Clerk of the Court of Civil Appeals for the Fourth Supreme Judicial District of the State of Texas.

The Notice of Appeal filed in the Court below is pursuant to 28 U.S.C. 1257(2).

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

The Texas statutes involved are:

(1) Section 4.02, Chapter Four, Texas Family Code, Vernon's Annotated Texas Statutes,

Duty to Support

Each spouse has the duty to support his or her minor children. The husband has the duty to support the wife, and the wife has the duty to support the husband when he is unable to support himself. A spouse who fails to discharge a duty of support is liable to any person who provides necessaries to those to whom support is owed.

(2) Article 602 Texas Penal Code, Vernon's Annotated Texas Statutes:

Desertion of wife or child

Any husband who shall wilfully desert, neglect or refuse to provide for the support and maintenance of his wife who may be in necessitous circumstances, or any parent who shall wilfully desert, neglect or refuse to provide for the support and maintenance of his or her child or children under eighteen years of age, shall be guilty of a misdemeanor, and upon conviction, shall be punished by confinement in the County Jail for not more than two years.

(3) Article 602a, Texas Penal Code, Vernon's Annotated Texas Statutes:

Subsequent conviction for desertion of
wife or child; leaving state

Any husband who has been convicted of the misdemeanor offense of deserting, neglecting or refusing to provide for the support and maintenance of his wife who may be in necessitous circumstances, or any parent who has been convicted of the misdemeanor offense of deserting, neglecting, or refusing to provide for the support and maintenance of his or her child or children under eighteen years of age, and who shall thereafter wilfully desert, neglect or refuse to provide for the support and maintenance of his or her child or children under eighteen years of age, shall for each and every subsequent such violation be guilty of a felony; any husband who shall wilfully desert, neglect, or refuse to provide for support and maintenance of his wife who may be in necessitous circumstances, or any husband who shall wilfully desert, neglect, or refuse to provide for the support and maintenance of his child or children under eighteen years of age, and who shall desert said wife or children by leaving the State of Texas and by going into some other state, shall be guilty of a felony; and upon conviction shall be punished by confinement in the County Jail not less than ten days nor more than two years, or by confinement in the State Penitentiary for not more than five years.

(4) Article 1, Vernon's Annotated Texas Statutes:

The common law of England, so far as it is not inconsistent with the Constitution and laws of this State, shall together with such Constitution and laws, be the rule of decision, and shall continue in force until altered or repealed by the Legislature.

The constitutional provisions involved are:

(1) The Equal Protection clause of the Fourteenth Amendment to the United States Constitution:
"... nor shall any State ... deny to any person within its jurisdiction the equal proctection of the laws."

(2) The Due Process clause of the Fourteenth Amendment to the United States Constitution:
". . . nor shall any State deprive any person of life, liberty, or property, without due process of law; . . ."

QUESTION PRESENTED

The Courts of the State of Texas in the application of the common law, as statutorily adopted in Article 1, Vernon's Annotated Texas Statutes, and their interpretations thereof pursuant to Articles 602 and 602a, Texas Penal Code, Vernon's Annotated Texas Statutes and Article 4.02, Chapter 4, Texas Family Code, have consistently ruled that there is no legal liability on the part of a natural father of an illegitimate child to support such child in spite of his legal obligations for the support and maintenance of those children which have been classified and categorized by fate and fortuity as "legitimate".

An additional consequence of the foregoing application results in the entire burden of maintaining and supporting the illegitimate child being placed on his mother, while his father escapes all legal and financial obligations toward him.

The question presented is whether the "Texas rule" is unconstitutional as violating the due process and the equal protection clauses of the Fourteenth Amendment to the Constitution of the United States, insofar as it grants to the legitimate child the right to require support and maintenance from his natural father while denying the illegitimate child the right to require his natural father to so maintain and support him; thereby imposing the entire burden for such maintenance and support on the female partner to the extramarital union.

STATEMENT OF THE CASE

Appellants came before the trial court by means of a petition asking that Francisco Ocasio Perez, Appellee, be found by the court to be the natural father of Zoraida Gomez, and further asking the court to order Appellee to pay a reasonable amount toward the support of said illegitimate child during her minority. Appellants' petition is set forth at pages 97 and 98 of the Record.

Appellant, Linda Gomez, testified that she first became acquainted with Appellee in June of 1968 at a party given by mutual friends. At the time of their meeting, she was unmarried and Appellee told her he was also unmarried. In fact, Appellee was lawfully married to someone else as of the date of the filing of this case. Thereafter Appellant became intimate with Appellee, and in June of 1969 a child, Zoraida Gomez, was born of their relationship. The trial court found that Appellee was the natural father of Zoraida Gomez and that Appellant was the natural mother. Further, the court found that the illegitimate child needed the support and maintenance of Appellee and that Appellee was able to give such support, but that he has refused and failed to do so. However, the trial court held that Appellee, the natural father of Zoraida Gomez, has no civil liability to support said illegitimate child. (R-112, 113).

The judgment of the trial court was contrary to the position presented by Appellants during the hearing on the merits — that Texas law, which denies liability on the part of a natural father to support and maintain an illegitimate child, deprives said child of his rights under the due process and equal protection clauses of the Fourteenth Amendment to the United States Constitution. Further, such deprivation is to the injury of the natural mother as well because the entire burden of support and maintenance is, in effect, placed on her.

The same claim was again raised by Appellants in their brief before the Court of Civil Appeals for the Fourth Supreme Judicial Ditsrict of Texas. That court considered the issue and rejected Appellants' constitutional contentions. Appellants' constitutional argument was not without recognition, however, for a dissenting opinion by Justice Carlos Cadena, Associate Justice of the Court of Civil Appeals, spoke directly to, and in favor of Appellants' claims. (R - pp. 50 through 58). Appellants preserved this point in the Motion for Rehearing in the Court of Civil Appeals which was denied. The Application for Writ of Error to the Supreme Court of Texas again raised this point, but the Court denied discretionary review.

SUMMARY OF ARGUMENT

The State of Texas, in statutorily adopting the common law of England, has engaged in a consistent policy of depriving the illegitimate child of the right to seek paternal support. Through "action of silence" by the State legislature and through the affirmance of the State courts, Texas has continued a policy of senseless differentiation between legitimate and illegitimate children, granting the former class the right to paternal support while denying this important right to the latter class.

Such a discriminatory classification of children, based solely on the fortuitous circumstances of birth contravenes the equal protection clause of the Fourteenth Amendment to the Constitution of the United States. Texas has no valid justifiable interest for perpetuating this archaic inequity. This Court in several recent opinions concerning the rights of illegitimates, one of which has been characterized by some as a deviation from the principles enunciated in the others (a characterization with which we do not agree), has consistently forbidden states from devising irrational schemes to prevent the illegitimate from seeking satisfaction of his

needs through parental support. Similarly here, the illegitimate has the right to be recognized as a child with respect to an equal application of those state laws designed to insure parental support of children.

In applying its discriminatory dichotomy, Texas has acted so as to protect the "more favored" male while placing the entire burden of supporting the illegitimate on the "less favored" female. Again the State can demonstrate no rational relation for this differential treatment other than out-worn concepts of morality and prejudice based on sex. This Court has held such a classification to be in violation of the equal protection clause.

In effect, Texas has created an insurmountable barrier which absolutely deprives the illegitimate from securing paternal support. The State has woven a fabric of incongruous laws geared solely to protect the undeserving male and to punish the more deserving child. Under the fantasized arguments of "problems of proof" Texas has maintained its prejudicial position by refusing to confront and resolve paternal evidentiary issues for support purposes which it daily confronts and resolves for other purposes. Hence the illegitimate child is denied due process of law.

Granting illegitimate children the right to seek and obtain paternal support would neither contradict this Court's decisions in the area of Welfare law, nor would it result in vast numbers of such children losing their AFDC benefits.

ARGUMENT

I.

The right to seek and obtain paternal support, a significant element of a child's right to life from which the bastard has been historically barred, is an important right that Texas law has persistently granted to a legitimate child, but denied to an illegitimate child solely because of the fortuitous circumstances surrounding his birth, circumstances patently beyond his control.

Just as the fetus clings to its mother's umbilical cord for sustenance, so clings the infant to the "umbilical cord" of his parents' affection and nurture — that "line of life," once severed, leaves the child exposed to society's capricious winds of fortune. Clearly, as among all of the varied species of this earth, there are none where the offspring are born so completely helpless and remain so overwhelmingly dependent upon their parents for such a long period of time as is the child of man. Indeed, the word "infant" stems from the Latin derivative *infans*, which according to *Webster's New Collegiate Dictionary* means "incapable of speech," hence a recognition of the child's total dependence. In what manner has the State of Texas spoken for these speechless children?

> When the word "child" or "children" is used in a statute (unless the statute clearly reflects the contrary), it means a legitimate child or children only . . . while there is some conflict of authorities upon the meaning of the word "child" when used in a statute, deed, or will . . . the decided weight of authority is in favor of the construction that the use of such word refers alone to legitimate children. *Beaver v. State*, 96 Tex. Cr. R. 179, 256 S.W. 929 (1923).

The foundation of the present Texas law, whereby an illegitimate child is deprived of his right to seek and obtain support

from his natural father, rests in Article 1 of Vernon's Annotated Texas Statutes. By this statute, Texas has statutorily adopted the common law of England as the rule of decision in this State. It is on this foundation that the Texas courts, in their interpretation of Articles 602 and 602a of the Penal Code as well as Section 4.02 of the Family Code, have consistently held the deprivation of the illegitimate child's right to paternal support to be a continuing part of the Texas juridical heritage.

In *Beaver v. State, supra.*, the Texas Court of Criminal Appeals, in conjunction with engrafting the common law rule on what is presently Article 602 of the Penal Code, stated the following as a basis and justification for its decision:

> The rule of the common law has been so long established and so uniformly recognized that until the Legislature speaks in unmistakable terms showing an intention to change the rule in this State, we must perforce hold that the statute in question does not apply in the present instance.

As recently as 1965, the Texas Supreme Court entertained the opportunity to re-examine this antiquated rule regarding illegitimate children, and again it reaffirmed and preserved the common law dichotomy, stating: ". . . here a father is not under a common law or statutory duty[2] to support his illegitimate child." *Home of Holy Infancy v. Kaska*, 397 S.W. 2d 208, 210 (1965)

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2. It is interesting to note that in Articles 602 and 602a of the Penal Code, the word "husband" is used to describe one's duty toward his spouse, whereas the parallel teminology employed to describe one's duty toward his child is somewhat broader, e.g. ". . . **any parent** who **shall** . . . refuse to support **his or her child** . . ." (Article 602) and ". . . **any parent** . . . refusing to provide for the support of **his** or **her child** . . ." (Article 602a). Clearly the language utilized in these statutory provisions is capable of being interpreted to cover any child, whether born in or out of wedlock. However, the Texas Courts, rather than apply such an interpretation which would more aptly fulfill the legislative purpose of insuring parental support for children, have instead followed the senseless, prejudicial ostracism of the bastard.

The State of Texas in 1969, this time through its legislative branch, a g a i n was provided the opportunity to re-examine and abrogate its traditional deprivation of the illegitimate's right to paternal support. Again Texas chose not to abolish this antiquated dichotomy. This is evidenced by the relevant provision of Section 4.02 of the Family Code which defines the obligation of parental support in terms of ". . . **each spouse** (having) the duty to support his or her minor children." *Emphasis added.* By its very terms, the obligation of paternal support is imposed only upon fathers of legitimate children.[3]

Thus Texas, through its judicial or legislative machinery, or a combination of both, has persistently reaffirmed the basic premise of *Beaver v. State, supra.*, and in so doing has effectively denied the right of an illegitimate child to demand paternal support. With respect to this most important right, the illegitimate c h i l d is relegated to the position of a non-entity under Texas law.

II.

The Texas scheme, which g r a n t s to the legitimate child, but deprives to his illegitimate counterpart, the right to seek and obtain paternal support constitutes a denial of equal protection of the law under the Fourteenth Amendment to the United States Constitution.

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3. If the state legislature by its enactment of Section 4.02 of the Family Code has stated the width and breadth of the rights of illegitimates to parental support, has not the legislature then also abrogated the obligation of maternal support for illegitimates? This result must follow if parental support obligations depend exclusively on spousal circumstances. Conversely, if the term "spouse" is construed to include maternal "non-spousal" parents of illegitimates, then what rational basis can exist for the State's discrimination against the female parent so as to impose liability on her, liability from which the male parent totally escapes? Clearly the maternal obligation of supporting the illegitimate is recognized in Texas, at least prior to the enactment of Section 4.02 of the Family Code. See **Galveston H. & S.A. Ry. Co. v. Walker,** 106 S.W. 705, writ refused (C.A. 1907).

As Appellants have clearly established, there is no legally recognized duty on the part of a natural father to support his illegitimate children. *Home of Holy Infancy v. Kaska, supra.; Beaver v. State, supra.; Lane v. Phillips,* 69 Tex. 240, 6 S.W. 610 (1887). That the action of the State of Texas in refusing to recognize such a duty is "State Action" within the meaning of the equal protection clause of the Fourteenth Amendment to the United States Constitution has been cleary demonstrated. *Shelley v. Kraemer,* 334 U.S. 1, 15 (1948).

Appellants, of course, do not dispute that a state has broad power to establish certain social classifications, and perhaps, this is particularly true with respect to that body of law concerning familial relations, an area traditionally within the ambit of state power. However, even here, the prohibitions of the Fourteenth Amendment must apply, and in drawing such lines or making such distinctions, a state must be mindful of the equal protection clause, and it is forbidden to create and perpetuate a classification which constitutes an invidious discrimination toward a partcular class. *Levy v. Louisiana,* 391 U.S. 68 (1968); *Skinner v. Oklahoma,* 316 U.S. 535 (1942); *Griswold v. Connecticut,* 381 U.S. 479 (1965).

The test is whether the state's classification is based upon a difference which bears a substantial, reasonable and just relation to the object for which it is proposed. *Skinner v. Oklahoma, supra.; Brown v. Board of Education,* 347 U.S. 483 (1954); *Ashbury Hospital v. Cass County,* 326 U.S. 207 (1945). Irrespective of whether the classification is a novel creation, or as asserted by the State, a "long recognized principle in the jurisprudence of the State of Texas", the fact that the challenged law applies uniformly to all illegitimate children is of no consequence. This Court has held that:

> The Equal Protection Clause requires more of a state law than nondiscriminatory application within the class it establishes . . . it also imposes a requirement of some rationality in the nature of the class singled out . . . . The Equal Protection Clause does require that in defining a class subject to legislation, the distinctions that are drawn have "some relevance to the purpose for which the distinction is made" . . . *Rinaldi v. Yeager*, 384 U.S. 305, 308-309 (1966).[4]

Further, in regard to the "tradition" of the principle under attack, it must be stated that common law principles, when reviewed in the light of constitutional challenges, are entitled to no special consideration or sanctity. *Shelley v. Kraemer, supra.*, 17, 18.

Appellants will show that Texas, in depriving illegitimates of the right to require paternal support, has discriminated against the illegitimate child in contravention of the equal protection clause, because this action bears no logical or rational relation to, nor does it promote any justifiable purpose in the familial area of Texas jurisprudence.

A. The dichotomy which Texas law applies to children, by denying the illegitimate child the right to seek and obtain paternal support, is invidious discrimination without any valid State purpose, and thereby contravenes the equal protection clause.

Appellants do not attack all manners of discrimination between legitimates and illegitimates in the State of Texas, but rather limit their inquiry to the sole contention that the deprivation of the right to paternal support, which is, perhaps, the most important

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4. For additional cases stating the Equal Protection test also see: **Harper v. Virginia Board of Elections**, 383 U.S. 663 (1966); **Morey v. Doud, 354 U.S.** 457 (1957); **Metropolitan Cas. Ins. Co. v. Brownell**, 294 U.S. 580 (1935); **Lindsley v. National Carbonic Gas Co.** 220 U.S. 61 (1911).

right which Texas grants to legitimate children, but denies to illegitimate children, has such serious consequences as to constitute an unreasonable and invidious discrimination. Any inquiry into the irrationality of such discrimination must logically begin with an analysis of *Levy v. Louisiana, supra.*

Irrespective of the State's attempt to relegate the bastard to that of a "non-entity" regarding the obligation of paternal support, there can be no doubt that an illegitimate child is a "person" within the meaning of the equal protection clause. *Levy v. Louisiana, supra.*, at page 70. In *Levy* this Court struck down the provisions of the Louisiana wrongful death statute which denied an illegitimate child the right to recover for the wrongful death of his mother.[5]

Speaking for six members of the Court, Justice Douglas stated:

> We start from the premise that illegitimate children are not "non-persons." They are humans, live, and have their being. They are clearly "persons" within the meaning of the Equal Protection Clause of the Fourteenth Amendment. *Levy v. Louisiana, supra.* at page 70.

The Court in *Levy* held that "Legitimacy or illegitimacy of birth has no relation to the nature of the wrong allegedly inflicted on the mother." *supra.* at page 72. Similarly, a child's status at birth has no relation to the State's interest of insuring parental

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5. At the same time the Court also considered the case of **Glona v. American Guarantee & Liability Insurance Co.**, 391 U.S. 73 (1968). That case dealt with the opposite situation presented in **Levy.** The Court invalidated a provision of the same statute which deprived a woman of the right to recover for the wrongful death of her illegitimate child. Since **Levy** is primarily concerned with the child's right whereas **Glona** deals with the mother's right, for the purposes of this portion of the brief, we believe **Levy** to be the more applicable case.

support for all children within its jurisdiction.[6] To base a classification on the mere accident of birth has no more relevancy than to differentiate on the incidence of race or ancestry. *Brown v. Board of Education, supra.; Korematsu v. United States,* 323 U.S. 214, 216 (1944); *Sweatt v. Painter,* 339 U.S. 629 (1950); *Loving v. Virginia,* 388 U.S. 1 (1967).

Admittedly, the actual holdings in *Levy* and *Glona* are capable of a narrower interpretation, doing no more than equalizing the position of legitimate and illegitimate children *vis-a-vi* their mother. However, as Judge Cadena pointed out in his dissent (R. 52) ". . . the Supreme Court of Louisiana, on remand of *Levy* from the United States Supreme Court, assumed that the decision was not limited to the mother-child relationship." Regardless, there is no valid reason why *Levy* should not be extended to encompass the father-child relationship as well. See e.g. *Weber v. Aetna Casualty & Surety Co.,* _____ U.S. _____, 31 L.Ed. 2d 768 (1972), especially with respect to the most important right of parental support.

The State implies that this Court's decision in *Labine v. Vincent,* 401 U.S. 532 (1971) undercuts the *Levy* case. However, in that case the Court itself stated: "We emphasize that this is not a case, like *Levy,* where the State has created an insurmountable barrier to this illegitimate child." *Labine v. Vincent, supra.* at page 539. But in Appellants' situation Texas has created such a barrier. The illegitimate child is totally prevented from securing paternal support even when paternity has been proved beyond any

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6. We are not faced with what has been described as a choice between one of two "arbitrary schemes" (see dissent in Levy and Glona at 391 U.S. 80, 81). The parental obligation to support one's children existed prior to, and therefore is not a creature of state statute. Hence, the choice offered is either to perpetuate a prejudicial scheme to exclude illegitimates, or to prohibit a state, in derogation of the Fourteenth Amendment, to continue an arbitrariness simply by codifying it in statutory form.

doubt. Furthermore, there can be no question that in *Labine* the Court placed considerable emphasis on the fact that the issue there concerned the disposition of property at death as articulated by Justice Powell in the *Weber* case:

> That decision reflected, in major part, the traditional deference to a State's prerogative to regulate the disposition at death of property within its borders. *Labine, supra.* page 538. The Court has long afforded broad scope to state discretion . . . in providing for "the stabiltiy of . . . land titles and prompt and definite determination of the valid ownership of property left by decedents," . . . *Weber v. Aetna Casualty & Surety Co., supra.* at page 776.

But while *Labine* deals with the aftermath of death, this case deals with the needs and obligations of life.[7]

In *Weber* the Court specifically applied *Levy* to include the father-child relationship. In doing so, Justice Powell, speaking for seven members of the Court, answered the very argument the State offers here[8] by stating:

> We do not think that *Levy* can be disposed of by such finely carved distinctions. The Court in *Levy* was not so much concerned with the tortfeasor going free as with the equality of treatment under the statutory recovery scheme. *Weber v. Aetna Casualty & Surety Co., supra.* at page 775.

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7. In fact, **Labine, supra.**, at page 533, acknowledges the illegitimate's needs of life and does nothing to interefere with the Louisiana scheme whereby the illegitimate, through an action for alimony against the "lawful" heirs of the natural father, could insure recompense for such needs. Therefore, the facts of **Labine** recognize and protect the the needs of the illegitimate as fully as the decisions of **Levy** and **Weber.**

8. The State suggests that **Levy's** application is limited to only the mother-child relationship (**Amicus** at page 4), and also suggests that **Levy's** application is further limited solely to the tort area (**Amicus** at page 8, 9). Furthermore, the State's contention that **Jerry Vogel Music Co. v. Edward B. Marks Music Corp.**, 425 F. 2d 834 (1969) as a further indication of restrictive applicability of **Levy** is patently incorrect, as that case is so clearly distinguishable on its facts as to make further mention of it totally unnecessary.

Thus in *Weber* the Court reaffirmed its position in *Levy*, thereby requiring, at a minimum, that the State's classification with respect to illegitimate children bear some rational relationship to a legitimate state purpose. *Weber v. Aetna Casualty & Surety Co., supra.* at page 777. See also *Morey v. Doud, supra.; Williamson v. Lee Optical Co.*, 348 U.S. 483 (1955); *Gulf, Colorado & Santa Fe Ry. v. Ellis*, 165 U.S. 150 (1896); *Yick Wo v. Hopkins*, 118 U.S. 356 (1886).

But what are the State's reasons for its different treatment respecting the illegitimate's right to paternal support? One of the traditional arguments advanced in justification of laws discriminating against illegitimate children is that it promotes morals by discouraging promiscuity. Judge Cadena in his dissent aptly repells such a farfetched contention by pointing out:

> Even if we assume, closing our eyes to the soaring illegitimate birth rate, that a woman will refrain from illicit sexual activity in order to avoid bearing a child who will be denied paternal support, there is no basis for the conclusion that the Equal Protection Clause permits resort to this practice of vicarious expiation. Nor can it be seriously contended that the governmental purpose of promoting marriage and discouraging sexual promiscuity is promoted by a rule which guarantees to the rake immunity from liability for the support of the children born as a result of his extramarital copulative performances. *G._____ v. P._____*, 466 S.W. 2d 41, 45 (1971).

Certainly, the unpersuasiveness of the State's argument is personified by the parents in this case. If the purpose of denying an illegitimate child the right to compel his natural father to support him when he is in need and want is to prevent moral decay or sin, then this is not an accomplishment of that purpose. For every man knows, that under the laws of the state of Texas, he may spawn through and seed the entire State, but if he does so without benefit of marriage, he is not responsible for the effects of his fecundity. In view of

the equal protection clause, how can we deny an illegitimate child the right to paternal support solely because he was conceived in sin, a sin which was not his but his parents? Such a denial is surely an invidious discrimination. *Levy v. Louisiana, supra* at page 68.

The argument that compelling a man to support his illegitimate progeny would tend to destroy the family is equally unpersuasive. There is nothing to show that in the 48 states, which have imposed such an obligation on the father of an illegitimate child, that they have experienced any greater disruption of the family than Texas which denies the right to paternal support to illegitimates. Indeed, the preservation of the family institution calls for it to prevail against many pressures of modern day life. But can we say that the State is permitted to aid to the extent of becoming a partner to concealing the wrong and in so doing punish the innocent illegitimate child? For to what extent does the irresponsible sexual activity of the father contribute to the stability of his legitimate family? If the true purpose of the discrimination against illegitimates regarding support is to preserve the family, then Texas shows no concern whatsover for the stability of the family of the illegitimate's mother, on whom the entire burden of support is placed.

It is asserted that paternal support for illegitimates must await legislation in order to insure ". . . provision for proper standards and safeguards for determining the paternity of an illegitimate." *G._____ v. P._____, supra.*, at page 42. Why should this be? Surely the courts cannot consider themselves incapable of resolving the issue of paternity by means of existing evidentiary principles for the Texas courts themselves have repeatedly faced this issue and repeatedly resolved it. For the paternity of a child becomes an issue in divorce litigation when ". . . a man, having by a woman a child or children shall afterwards inter-

marry with such woman, such child or children shall thereby be legitimated . . ." (Section 42, Texas Probate Code, Vernon's Annotated Texas Statutes). See, e.g. *Glona, supra., at* page 76; *Stanley v. Illinois,* _____ U.S. _____, 31 L. Ed 2d 551, 561 (1972).

Nor can it be said that the proposition of denying illegitimates the right of requiring paternal support can be justified by general considerations of public policy. Even the Texas Courts recognize this.

> ". . . Appellee was under a moral and natural obligation to support his infant son, though he may have been born out of wedlock; and so far from being against, it is in accordance with, the spirit of the law, as well as public policy, that he s h o u l d be treated as a member of the family of Appellee. *Lane v. Phillips, supra.,* at page 612.

Thus, there exists no valid rationale to justify any legitimate State purpose for depriving illegitimate children of their right to paternal support, other than pure prejudice. We maintain that such a situation is wholly intolerable in face of the equal protection clause. As Justice Powell succinctly phrased it:

> The status of illegitimacy has expressed through the ages society's condemnation of irresponsible liaisons b e y o n d the bonds of marriage. But visiting this condemnation on the head of an infant is illogical and unjust . . . . Courts are powerless to prevent the social opprobium suffered by these hapless children, but the Equal Protection Clause does enable us to strike down discrimintory laws relating to the status of birth. *Weber v. Aetna Casualty & Surety Co., supra.* page 779.

B. The placing of the burden of support of the illegitimate child wholly on the female parent has no rational relationship to a valid State purpose, and thereby constitutes an invidious discrimination in contradiction to the Equal Protection Clause.

Equally as onerous as the State's discrimination against the illegitimate child is its invidious scheme to place the entire burden of supporting such child on the female parent. To extoll the virtues of motherhood but be blind to its toils may be fact, but should it be law? Therefore the pertinent inquiry must be what possible legitimate state interest is promoted by singling out the female partner to acts of sexual promiscuity nad forcing her, and her alone, to bear the economic consequences. We submit there is none.

In Texas, it is well settled that the mother of an illegitimate child bears the entire legal burden of supporting and maintaining such child.

> . . . After the (natural father) had executed the agreement (to pay child support for an illegitimate child) he had only promised to do something that was not his legal obligation. Additionally, since the agreement to support ran to the mother, it was merely a promise to do something that she, and not the (father) was legally bound to do. *C.*____ *v. W.*____, 480 S.W. 2d 474, 478 (1972).

Perhaps the only justification the State can offer is the farfetched argument that if a paternal obligation to support was enforceable then, perchance, some opportunistic women might entrap the "innocent" male for pecuniary purposes.

This argument was implicitly made in *Glona* and *Weber*, and in both cases this Court found such a contention wholly untenable.

> . . . We see no possible rational basis . . . for assuming that if the natural mother is allowed recovery for the wrongful death of her illegitimate child, the cause of illegitimacy will be served. It would, indeed, be farfetched to assume that women have illegitimate children so that they can be compensated in damages for their death." *Glona v. American*

Guarantee and Liability Insurance Co., supra., page 75. *Weber, supra.*, at pages 777, 778.

No doubt this sexual discriminaton had its inception in the days of antiquity, when men were "free to sow their wild oats" while society endowed women, the weaker sex, with the duty to remain chaste, or at least guard against the "accidents of love." If this fossil is all that remains to justify the State's placement of the economic, burden of support, then the "rational relation" is relegated to differentiation purely on the basis of sex. As this Court has already held in *Reed v. Reed*, _____ U.S. _____, 30 L. Ed. 2d 225 (1971):

> To give a mandatory preference to members of either sex over members of the other . . . is to make the very kind of arbitrary legislative choice forbidden by the Equal Protection Clause of the Fourteenth Amendment . . . the choice in this context may not lawfully be mandated solely on the basis of sex. *Reed, supra.*, at page 230.

III.

The State's creation of a legal barrier which prevents an illegitimate child from seeking and obtaining paternal support, is arbitrary and capricious, bearing no real or substantial relation to the avowed State purpose, and hence denies the illegitimate his right to due process under the Fourteenth Amendment to the United States Constitution.

Closely related to equal protection is the concept of substantive due process which, except where justified or excused by some reasonable classification, requires equal appiication of the law. *Stanley v. Illinois, supra.; Bell v. Burson*, 402 U.S. 535 (1971); *Carrington v. Rash*, 380 U.S. 89 (1965); *Shapiro v. Thompson*, 394 U.S. 618 (1969). In the area of substantive due process, the

general rule is that state legislation is permissible if it is not unreasonable, arbitrary, or capricious, and the means selected have a real and substantial relation to the object sought to be obtained. *Nebbia v. New York*, 291 U.S. 502 (1934); *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937).

As Appellants have already demonstrated *infra.*, the sole remaining reason for the invidious discrimination practiced by Texas against illegitimate children is one of historical ostracism.[9] In present day context this discriminatory scheme works purely to protect the "more favored" male, and in so doing it systematically oppresses the disadvantged class of illegitimate children. There can be no valid justifiable State interest in shielding the man, who is at least a co-equal in the societal wrong, while at the same time punishing the innocent child for a crime which was not his, but his parents.[10] Surely ". . . visiting this condemnation on the head of an infant is illogical and unjust." *Weber v. Aetna Casualty & Surety Co., supra.* at page 779.

The fact that Texas law so overwhelmingly favors the male over the more helpless child is evident from the case of *C.* _____ *v. W.* _____, *supra.* In that case the father, aside from factually acknowledging the illegitimate, voluntarily contracted to support the child. But Texas, in its unswervable position of favoritism-discrimi-

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9. "The bastard, like the prostitute, thief and beggar, belongs to that motley crowd of disreputable social types which society has generally resented, always endured. He is a living symbol of social irregularity, and undesirable evidence of contramoral forces; in short, a problem as old and involved as human existence itself." Davis, **Illegitimacy and the Social Structure**, 45 Am. J. of Sociology 215 (1939). Also see Krause, **Equal Protection for the Illegitimate**, 65 Mich. L. Rev. 477 (1967), and **Equal Protection and Paternity**, 36 U. of Chi. L. Rev. 338 (1969).

10. If any analysis to tort law can be made here, as the State attempts to do, then we submit Texas' discrimination against illegitimate children is tantamount to rewarding one of the joint tortfeasors at the expense of the victim.

nation, abrogated the contract, thereby releasing the man from any support obligation whatsoever. *C.____ v. W.____, supra.* If ever the State has erected as insurmountable barrier, then this is it.

In *Stanley v. Illinois, supra.*, this Court held that when "the presumption here created is . . . definitely conclusive — incapable of being overcome by proof of the most positive character." (citing *Carrington v. Rash, supra.* at page 96), then such arbitrariness contravenes the concepts of due process and equal protection. In the *Stanley* case this Court struck down Illinois' insurmountable barrier which automatically precluded the father of an illegitimate child from obtaining or retaining parental custody of the child.[11] If states are forbidden from creating an insurmountable barrier against the father of an illegitimate with respect to custodial rights, how then may Texas be permitted to maintain an insurmountable barrier against the illegitimate child with respect to his right to paternal support? To say such a discrimination is justified because of difficult problems of proof, is no answer. *Glona v. American Guarantee & Life Insurance Co., supra.; Weber v. Aetna Casualty & Surety Co., supra.*

> Procedure by presumption is always cheaper and easier than individualized determination. But when, as here, the procedure forecloses the determinative issues . . . when it explicitly disdains present realities in deference to past formalities, it needlessly risks running roughshod over the important interests

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11. In judging the impact of **Stanley v. Illinois, supra.**, on present Texas jurisprudence we observe a dilemma. Natural fathers have legally recognized custodial rights in illegitimates. How may the State, in protecting the best interests of such a child, terminate the custodial rights of a natural father who does not provide proper financial support? Either the State cannot and the child remains deprived and unprotected or the State will now legally recognize support obligations only in those limited situations where the support is not provided by a father with custody of the child. Needs are no greater because they are recognized and obligations no more binding because exposed.

of both parent and child. It therefore cannot stand. *Stanley v. Illinois, supra.* at page 562.[12]

Clearly then, the "problems of proof" argument is an evasion of the issue. For example Texas already deals with such problems of finding paternity in those cases where the sexual act is imposed upon the female against her will. In such cases the needs of the resulting offspring are used as a "measure of damages" for the father's tort once paternity has been established. *Jaffe v. Deckard,* 261 S.W. 390 (1924). Similarly, the issue of paternity is dealt with in protecting the natural father's homestead exemption. *Lane v. Phillips, supra.*

Hence, in these situations the Texas courts have faced the problems of determining paternity and in so doing, have implicitly recognized the natural obligation to support. Why then maintain an insurmountable barrier against the illegitimate child seeking support from his natural father? Should such a child be relegated to the position of begging for his irregularly bestowed scraps of morality, merely because of an accident of birth? The illegitimate child is entitled to due process.

IV.

Granting illegitimate children the right to seek and obtain paternal support, like that similarly enjoyed by legitimate children, would neither contradict this Court's decisions in the area of Welfare law, nor would it result in vast number of such children losing their AFDC benefits.

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12. For additional cases commenting on administrative convenience not constituting a sufficient state justification, at least when important rights are concerned, see **Goldberg v. Kelly,** 397 U.S. 254 (1970); **Bell v. Burson, supra.; Carrington v. Rash, supra.; Shapiro v. Thompson, supra.**

In their Memorandum as *Amicus Curiae* on behalf of Appellee, the State of Texas contends ". . . that this Court has already indicated its reluctance to extend the decisions in *Levy* and *Glona* beyond the facts presented in such cases." *Amicus* at page 5. As authority for this proposition they cite *King v. Smith*, 392 U.S. 309 (1968). The State then goes on to suggest if this Court applies *Levy* to encompass Appellants' constitutional claims, then this ". . . would require the reversal of *King*, or in the alternative would result in many present AFDC recipients being declared ineligible for such benefits." *Amicus* at page 8. We do not agree.[13]

The relevant facts in *King* show that under Alabama's "substitute father" regulation[14] a mother and her four children were denied AFDC benefits solely because she allegedly had sexual relations with a man, who was not the natural father of the children and thereby had no legal duty to support them, and who in fact was not supporting them. *King v. Smith, supra.* at pages 315-16. The State asserts that if the obligation of support is applied ". . . to the relationship between an illegitimate child and

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13. The crux of the State's argument in this respect is based upon the unfounded premise that if illegitimates had the right to seek paternal support, then Texas would be forced to, or permitted to strip literally thousands of these children from its AFDC rolls solely for this reason, and without further consideration as to whether or not they are actually receiving such paternal support and care. Hence, the State argues that the Court, not wanting to effect such a result, specifically declined to apply Levy in deciding King. As we shall demonstrate this analysis is patently in error.

14. At the time Alabama enforced its "substitute father" regulation to deny AFDC benefits to children of a mother who "cohabited" in or outside the home with any man. This regulation was applied regardless of the man's relationship with, or legal support obligation toward such children, and irrespective of whether or not he was actually supporting them. Indeed 20,000 recipients were deprived of AFDC by reason of this device. In disposing of the case under the applicable federal statutory provisions and their legislative history, the Court presented a rather detailed analysis of the fruitless attempts by states to curb the sins of parents by punishing their children through the Welfare System. King v. Smith, supra..

its (sic) natural father then the result in *King* would have been decidedly different." Jurisdictional Statement, page 6. However, we would emphasize that in the *King* case the "substitute father" was not the natural father of any of the children. Clearly then, even if an illegitimate child had the right to seek support from his father, such a paternal obligation would only extend to the child's natural father. Hence, a non-natural, non-adoptive father would still have no legal obligation toward supporting the child. Therefore, to suggest a revitalization of the "substitute father" rule under the very facts which brought about its demise is patently incorrect. *King v. Smith, supra.* Also see *Lewis v. Martin*, 397 U.S. 552 (1970); *Ojeda v. Hackney*, 319 F. Supp. 149 (N.D. Tex. 1970).

Furthermore, AFDC statistics do not support the State's contention. In Texas 93% of the AFDC children are being reared by the mother; 5.3% are in the care of their father; and only 1% have both their mother and father in the home.[15] Surely Texas cannot seriously claim that the mere existence of an illegitimate's right to seek paternal support would mean the loss of that child's AFDC even where his natural father does not live in the home and does not contribute to the child's maintenance. Such a contention would clearly contradict Sections 402(a) (10) and 406(a) of the Social Security Act, 42 U.S.C. *SS* 602(a) (10), 606 (a), which provide that aid to families with dependent children shall be furnished with reasonable promptness to all eligible individuals, and then defines "dependent child" as one who has been deprived of

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15. **"Breaking the Poverty Cycle in Texas"** (1970), page 18. This was the published report of the Senate Interim Committee on Welfare Reform, after their having made an authoritive and exhaustive study of Welfare in Texas. The 5.3% figure shown above represents those chidren who actually live with, and who are being cared for by their fathers. Athough the report cites that approximately 27% of the children on the AFDC rolls are illegitimate and recommends "strengthening the laws regarding the paternity obligation in cases of illegitimacy" (page 53), it characterizes the savings on State Welfare costs as "potential" not a guaranteed immediate windfall. (page 58).

parental support or care by reason of a parent's death, incapacity, or **continued absence from the home.** *King v. Smith, supra. Damico v. California,* 389 U.S. 416 (1967); *Meyers v. Juras,* 327 F. Supp. 59 (D. Ore. 1971), aff'd _____ U.S. _____, 30 L. Ed 2d 39, reh. den. 280. Moreover, if the State's contention is correct, then how does one explain the vast numbers of legitimate children receiving AFDC whose fathers are not dead or incapacitated, for there certainly is a paternal obligation to support in these cases.

In the *King* case, the question before this Court was whether Alabama's "substitute father" regulation contravened various provisions of the Social Security Act, 42 U.S.C. *SS*601-609, and the Fourteenth Amendment of the United States Constitution. The Court achieved a satisfactory disposition of the case on the statutory grounds, thereby making it unnecessary to consider the constitutional claim. *King v. Smith, supra.* at page 333. But surely the fact that the decision in *King* was based on the narrower statutory grounds rather than on the constitutional claim cannot be taken as demonstrable evidence of the Court's "reluctance" to apply *Levy* to the proper case. See e.g. *Weber v. Aetna Casualty & Surety Co., supra.* For even in *King,* the Court, at least by implication, recognized that Alabama's desire to promote morality by disqualifying innocent, needy children from AFDC simply did not have a sound or legitimate basis.

To punish the illegitimate child for an act over which he had no control, an act committed patently before his birth, and an act committed not by him but by two other people can only be viewed as an intolerable situation under our Constitution and laws.

CONCLUSION

For the foregoing reasons, Appellants respectfully request that the decision below be reversed.

Respectfully submitted, August, 1972,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 71-575

GOMEZ,

Appellant,

—v.—

PEREZ,

Appellee.

MOTION OF AMERICAN CIVIL LIBERTIES UNION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE*, AND BRIEF *AMICUS CURIAE*

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 71-575

GOMEZ,

Appellant,

—v.—

PEREZ,

Appellee.

IOTION OF AMERICAN CIVIL LIBERTIES UNION FOR LEAVE TO FILE BRIEF, *AMICUS CURIAE*

Pursuant to Rule 42(3) of the Rules of this Court, the nerican Civil Liberties Union respectfully moves for ve to file a brief *amicus curiae* in the above-entitled case. e attorney for appellant has consented to the filing of e attached brief. The attorney for respondent refused nsent.

The American Civil Liberties Union has a long-standing stitutional interest in protecting the constitutional rights children, legitimate and illegitimate. Attorneys of the nerican Civil Liberties Union appeared before this Court recent years to argue *In Re Gault,* 387 U.S. 1 (1967) d *Levy* v. *Louisiana,* 391 U.S. 68 (1968). The former cision held that children involved in juvenile proceed-gs were entitled to a wide range of constitutional pro-

tections in such proceedings. The latter decision held that illegitimate children were entitled as a constitutional matter to pursue an action for money damages incurred by the wrongful death of their natural mother. The Union also filed *amicus curiae* briefs in *Labine* v. *Vincent*, 401 U.S. 532 (1971), and in *Weber* v. *Aetna Casualty and Surety Comp.*, 92 S. Ct. 1400 (1972).

The case at bar draws into question the right of illegitimate children to receive financial support from their natural father. The question is a complex one which involves construction of the equal protection clause of the Fourteenth Amendment. We believe that our brief will be of substantial assistance to the Court.

Respectfully submitted,

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In the

Supreme Court of the United States

October Term, 1972

No. 71-575

Gomez,

Appellant,

—v.—

Perez,

Appellee.

BRIEF OF AMERICAN CIVIL LIBERTIES UNION, *AMICUS CURIAE*

Interest of Amicus

The interest of amicus is set out in the Motion for Leave to File, *supra*.

Statement of the Case

Appellant sued, in behalf of her illegitimate child, for a declaration that appellee was the father of such child and that he be required to provide financial support to him. The trial court entered a judgment declaring appellee to be the father of the child, but decreeing that there is no civil liability on the part of a father to support his illegitimate children. The Court of Civil Appeals of Texas affirmed, 466 S.W.2d 41 (1971), on the grounds that neither Texas common nor statutory law provides a right of action by which an illegitimate child can recover support payments from his father. This Court noted probable jurisdiction to decide the constitutional question involved.

The Question Presented

Whether Texas law denying to illegitimate children a right to paternal support while granting such right to legitimate children violates the Equal Protection Clause of the Fourteenth Amendment to the Constitution.

ARGUMENT

I.

The Texas law denying the right of paternal support to illegitimate children while granting it to legitimate children violates the Equal Protection Clause of the Fourteenth Amendment, as applied by the Court in *Levy* v. *Louisiana* and *Weber* v. *Aetna Casualty & Surety Co.*

The Court once again is asked to apply the Equal Protection Clause of the Fourteenth Amendment to state discrimination against children who have the misfortune to be born out of wedlock. In its most recent decision in this area, the Court struck down a Louisiana statute which relegated illegitimate children to an inferior status, as opposed to legitimate children, with regard to workmen's compensation benefits. *Weber* v. *Aetna Casualty & Surety Co.*, 92 S. Ct. 1400 (1972). The Court thereby re-affirmed its earlier ruling in *Levy* v. *Louisiana*, 391 U.S. 68 (1968). The *Weber* Court summarized its holding as follows:

> "The status of illegitimacy has expressed through the ages society's condemnation of irresponsible liasons beyond the bonds of marriage. But visiting this condemnation on the head of an infant is illogical and unjust. Moreover, imposing disabilities on the illegitimate

child is contrary to the basic concept of our system that legal burdens should bear some relationship to individual responsibility of wrongdoing. Obviously, no child is responsible for his birth and penalizing the illegitimate child is an ineffectual—as well as unjust—way of deterring the parent. Courts are powerless to prevent the social opprobrium suffered by these hapless children, but the Equal Protection Clause does enable us to strike down discriminatory laws relating to status of birth where—as in this case—the classification is justified by no legitimate state interest, compelling or otherwise." 92 S. Ct. at 1406-1407.

This analysis applies equally to the instant case. Here, too, a class of children is singled out and penalized solely because of the status of their birth, over which they have no control. Here, too, there is no legitimate state interest, "compelling or otherwise," to justify such unequal treatment. The guarantees of the Equal Protection Clause require that this Court strike down the arbitrary and capricious state discrimination by which illegitimate children are denied the same rights as legitimate children to paternal support.

A. *The bearing of applicable equal protection standards upon a state classification based upon legitimacy of birth.*

As this Court recognized in both the *Levy* and *Weber* decisions, at least two tests have been applied to determine the validity of state statutes under the Equal Protection Clause. At a minimum, any state classification must bear a reasonable relationship to a legitimate state purpose.

> [T]he attempted classification . . . must always rest upon some difference which bears a reasonable and just relation to the act in respect to which the classification is proposed, and can never be made arbitrarily and without any such basis. *Gulf, Colorado & Santa Fe Ry.* v. *Ellis,* 165 U.S. 150, 155 (1896).[1]

In *Levy* and *Weber* the Court found that prohibiting recovery by illegitimates in those cases in no way furthered the state goals of compensating children who had lost a parent through the wrongful action of another or in the course of such parent's employment. Moreover, the recognized state interest in protecting the family unit was not furthered by the discriminations against the unfortunate children in those cases. As the *Weber* opinion stated:

> We do not question the importance of that interest; what we do question is how the challenged statute will promote it . . . Nor can it be thought here that persons will shun illicit relations because the offspring may not one day reap the benefits of workmen's compensation. *Weber* v. *Aetna Casualty and Surety Co.,* 92 S. Ct. at 1405.

See also, *Glona* v. *American Guarantee and Liability Insurance Co.,* 391 U.S. 73, 75 (1968) (companion case to *Levy,* striking down a state law which denied wrongful death benefits to a mother for the death of her illegitimate child). As will be shown below, the discrimination in the instant case no more furthers a legitimate state interest than did the state action in *Levy, Glona,* and *Weber.*

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[1] See also *Morey* v. *Doud,* 354 U.S. 457 (1957); *Williamson* v. *Lee Optical Co.,* 348 U.S. 483 (1955); *Yick Wo* v. *Hopkins,* 118 U.S. 356 (1886).

The second test for determining questions arising under the Equal Protection Clause analyzes the nature of the characteristics or traits used to determine the classification and also the scope of individual conduct regulated or proscribed by the statute. If upon such examination it is found either that the classification is based upon an "inherently suspect" characteristic, or that the regulation infringes upon "sensitive and fundamental personal rights," the presumption of constitutionality normally accorded state enactments is reversed. See McKay, *Political Thickets and Crazy Quilts: Reapportionment and Equal Protection,* 61 Mich. L. Rev. 645, 666, 667 (1963). The statute will stand only if there "clearly appears . . . some overriding statutory purpose . . ." *McLaughlin* v. *Florida,* 379 U.S. 184, 192 (1964), or it is *necessary* "to promote a *compelling* governmental interest." *Shapiro* v. *Thompson,* 394 U.S. 618, 634 (1969).[2] The state must demonstrate that there are no reasonable alternative means of accomplishing the stated purpose without discriminating, *Carrington* v. *Rash,* 380 U.S. 89 (1965), and that the classification is neither impermissibly overbroad or underinclusive. *Kramer* v. *Union Free School Dist.,* 395 U.S. 621 (1969).

As the Court in *Weber* recognized, whatever test is ultimately applied under the Equal Protection Clause,

> [t]he essential inquiry in all the foregoing cases is, however, inevitably a dual one: What legitimate state interest does the classification promote? What fundamental personal rights might the classification endanger? 92 S. Ct. at 1405.

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[2] See also *Oyama* v. *California,* 332 U.S. 633, 640 (1948); *Brown* v. *Board of Education,* 347 U.S. 483 (1954); *Harper* v. *Virginia Board of Elections,* 383 U.S. 663 (1966).

If the personal rights endangered are fundamental and substantial, or if the basis for the classification is itself invidious, then a compelling state interest is required to override them and sustain the classification. If the personal rights involved are not so basic, then the state interest required to override them need not be so significant. A legitimate interest reasonably related to the classification is sufficient to sustain it. It may well be, however, that in some instances no sharp line can be drawn in applying the two standards; rather, there may be continua of suspectness and fundamentality, and there certainly may be a continuum of asserted state interests. See, *Comment—The Evolution of Equal Protection: Education, Municipal Services, and Wealth,* 7 Harv. Civ. Rts.—Civ. Lib. L. Rev., 103, 107 (1972).

The next section of this brief demonstrates that the classification here, as in *Levy* and *Weber,* seriously infringes the fundamental rights of illegitimate children and that classification according to legitimacy of birth is inherently invidious. Section C will show that, as in those cases, no legitimate state interest is served by the classification at issue, and that it therefore violates the Equal Protection Clause by whatever test is applied.

B. *A classification based upon legitimacy of birth is invidious and requires strict scrutiny under the Equal Protection Clause.*

The *Levy* and *Weber* Courts strongly suggested that the strict "compelling state interest" test was applicable to state discriminations against illegitimates.[3] To the extent

[3] In *Levy,* the Court stated: " . . . we have been extremely sensitive when it comes to basic civil rights . . . The rights asserted here in-

that the Court's decisions rested on this analysis, they were on solid ground. For classifications most often are suspect when they rest upon a status over which an individual has no control, such as race, *Brown* v. *Board of Education, supra;* ancestry or nationality, *Hirabayashi* v. *United States,* 320 U.S. 81, 100 (1943), or alienage, *Graham* v. *Richardson,* 403 U.S. 365 (1971). It is obvious that a child can no more control his legitimacy than he can control his race or ancestry. The illegitimate child is as entitled as the black child or the Japanese-American child to treatment as an individual rather than as a member of a minority group to which he belongs by the fact of birth. The state should be required to meet the same standard to justify discriminatory treatment of illegitimates as it must concerning racial, national or ethnic minorities. See Gray and Rudovsky, *The Court Acknowledges the Illegitimate: Levy* v. *Louisiana and Glona* v. *American Guarantee & Liability Co.,* 118 U. Pa. L. Rev. 1, 5-7 (1969).

A related ingredient of "suspect" classifications is the *unjustified* stigma of inferiority which usually attaches to them, a stigma which cannot help but destroy the "dignity of the individual." *Korematsu* v. *United States,* 323 U.S. 214, 236 (1944) (Justice Murphy dissenting). *See* Black, *The Lawfulness of the Segregation Decisions,* 69 Yale L.J. 421, 424 (1960); *Developments in the Law—Equal Protections,* 82 Harv. L. Rev. 1065, 1127 (1969). In *Brown* v. *Board of Education,* the Court specifically referred to the

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volve the intimate familial relationship between a child and his own mother." 391 U.S. at 71.

In *Weber,* the Court concluded its opinion by referring to the state classification there as imposing discriminations "relating to status of birth," 92 S. Ct. at 1407—the classic definition of a suspect classification. See also *Graham* v. *Richardson,* 403 U.S. 365 (1971).

adverse affect of a stigma of racial inferiority upon the potential for educational achievement of black school children:

> To separate [black school children] from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone . . . 347 U.S. at 494.

Similarly, in striking down a state anti-miscegenation statute in *Loving* v. *Virginia,* 388 U.S. 1 (1967), the Court held that the interests relied upon by the state to justify the classification were in themselves indicia of black inferiority:

> [T]he state court concluded that the State's legitimate purposes were to "preserve the racial integrity of its citizens," and to prevent "the corruption of blood," "a mongrel breed of citizens," and "the obliteration of racial pride," *obviously an endorsement of the doctrine of White Supremacy. Id.,* at 7 (emphasis added).[4]

Of course, mere suspicion that stigma attaches whenever classification is made with respect to some minority group will not always invoke strict scrutiny under the Equal Protection Clause. As one recent comment has noted:

> . . . the latter position is not so extreme as to be untenable if only because the potential for abuse with

[4] See also *McLaughlin* v. *Florida, supra* at 193; *Strauder* v. *West Virginia,* 100 U.S. 303, 306-308 (1880).

respect to certain minorities is a very real one. However, if one could also provide some indicia that the potential for abuse had in reality been realized, application of the strict standard of review would be justified. *Comment—The Evolution of Equal Protection: Education, Municipal Services, and Wealth,* 7 Harv. Civ. Rts.—Civ. Lib. L. Rev. *supra* at 137-138.

There is little doubt, however, that the potential for abuse has been more than realized in the case of illegitimate children. This Court has noted "the social opprobrium suffered by these hapless children." *Weber* v. *Aetna Casualty & Surety Co.*, 92 S. Ct. at 1407. The effect of the stigma of illegitimacy in our society has elsewhere been described as a "psychic catastrophe." [5] Indeed, the psychological effect of the stigma of bastardy upon its victim [6] is

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[5] "In the case of illegitimate birth the child's reactions to life are bound to be completely abnormal . . . To be fatherless is hard enough, but to be fatherless with the stigma of illegitimate birth is a psychic catastrophe." Fodor, *Emotional Trauma Resulting From Illegitimate Birth,* 54 Archives of Neurology and Psychiatry 381 (1945).

[6] In Jenkins, *An Experimental Study of the Relationship of Legitimate and Illegitimate Birth Status to School and Personal and Social Adjustment of Negro Children,* 64 Am. J. Sociology 169 (1958), the author investigated whether there were significant differences in the "adjustment" of legitimate and illegitimate Negro school children. All children in the (unfortunately rather small) sample were recipients of Aid to Dependent Children's funds and otherwise lived in comparable economic and social circumstances. "Adjustment" was considered to be reflected in I.Q., age-grade placement, school absences, academic grades, teacher's rating, and personal and social adjustment as measured by the California test of personality. Jenkins reported that:

> Two primary patterns emerged in this study. First, the legitimate children rated higher in every area except school absences . . . .
>
> The second discernible pattern was that the older group of illegitimate children consistently made a poorer showing than

comparable to the damaging psychological effects upon the victims of racial discrimination.

Thus, all the ingredients requiring strict scrutiny under the Equal Protection Clause are present where state laws classify on the basis illegitimacy. In addition, the Court has recently noted the constitutional priority of the right of a father to a full and legal relationship with his child, even when that child is illegitimate. In striking down under the Fourteenth Amendment an Illinois statutory scheme whereby an unwed father was deprived of custody of his illegitimate children without a hearing and without being given priority in subsequent adoption proceedings, the Court stated:

> It is plain that the interest of a parent in the companionship, care, custody, and management of his or her children comes to this Court with a momentum for respect lacking when appeal is made to liberties which derive merely from shifting economic arrangements. . . .
>
> . . . Nor has the law refused to recognize those family relationships unlegitimized by a marriage ceremony. *Stanley* v. *Illinois,* 92 S. Ct. 1208, 1212-1213 (1972).[7]

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the younger group, in comparison with the legitimate children. A possible explanation for this is that, as these children grow older and are able to internalize fully the concept of illegitimacy and as they become increasingly aware of their socially inferior status, their adjustment to self and society may become progressively less satisfactory. *Id.* at 173.

[7] See also *Prince* v. *Massachusetts,* 321 U.S. 158, 166 (1944); *Meyer* v. *Nebraska,* 262 U.S. 390, 399 (1923); *Skinner* v. *Oklahoma,* 316 U. S. 535 (1942).

The right of an illegitimate child to a legal relationship with his or her father equal to that afforded to a legitimate child must be of the same constitutional dimension as the right of a father to such a relationship with his child.

At stake in this case is the fundamental right of all children to grow up free from disabilities imposed by the state based solely on the circumstances of their birth; the right to an equal opportunity for individual development and fulfillment free from legal sanctions that create or support economic and psychological inferiority.

C. ***No legitimate state interest, compelling or otherwise, justifies the classification by which illegitimate children are denied the right to paternal support granted to legitimate children.***

This Court has explained that "[i]n determining whether or not a state law violates the Equal Protection Clause, we must consider the facts and circumstances behind the law, the interests which the State claims to be protecting, and the interests of those who are disadvantaged by the classification." *Kramer* v. *Union Free School District, supra,* 395 U.S. at 626.

The opinion of the Court of Civil Appeals of Texas below dealt with the constitutional considerations involved in this case by ignoring them completely. It is not surprising, therefore, that no attempt was made to identify and analyze the state interests that might arguably be served by the state classification at issue. A thorough discussion of the issues is contained in the dissenting opinion of Justice Cadena, who found that the asserted state interests were either not applicable or were not furthered by the classification in a significant or permissible way.

The state interest most commonly asserted in defense of state discriminations against illegitimates is that such classifications encourage marriage by deterring extramarital sexual relations.[8] This contention was raised and rejected by the Court in the *Levy*, *Glona*, and *Weber* cases.[9] The Court found it "farfetched" to believe that persons will shun illicit relations because of the possible long-term disabilities that might be placed upon the offspring that could result from such relations.[10]

There is even less reason in the present context to suppose that removing the obligation of support from the

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[8] It might be questioned whether the state any longer has a legitimate interest in regulating the consensual sexual activity of individuals in the light of modern notions of the right to privacy and association. See *Griswold* v. *Connecticut*, 381 U.S. 479 (1965); *Eisenstadt* v. *Baird*, 405 U.S. 438 (1972).

[9] The affirmance of the Louisiana inheritance statute in *Labine* v. *Vincent*, 401 U.S. 532 (1971), did not rest on any asserted state interest in regulating morals or marriage. Rather, as the *Weber* Court noted, "[t]hat decision reflected, in major part, the traditional deference to a State's prerogative to regulate the disposition at death of property within its borders." 92 S. Ct. at 1404. The Court noted that it had "long afforded broad scope to state discretion in this area," *Mager* v. *Grimar*, 8 How. 490, 493 (1850); *Lyeth* v. *Hoey*, 305 U.S. 188, 193 (1938), because of "the *substantial* state interest in providing for 'the stability of . . . land titles and the prompt and definitive determination of the valid ownership of property left by decedents,' . . . " 92 S. Ct. at 1404 (emphasis added, citation omitted). As in *Weber*, the compelling state interest that existed in *Labine* is absent in the instant case.

[10] The Court's insight is shared by laymen. In a scientific survey of 2031 families in Illinois, "carefully selected to represent the whole population of Illinois," only twenty percent of those polled agreed with the following statement: "The discrimination imposed by our law on the illegitimate child is an effective way to discourage sexual intercourse between unmarried persons." Eighty percent either disagreed or had no opinion. Krause, *Illegitimacy: Law and Social Policy*, 161-162, 171 (1971).

father of an illegitimate child would discourage sexual promiscuity. Indeed, as the dissent below suggested, the effect, if any, would be the opposite. A man might feel freer to engage in extra-marital sexual activities when he is secure in the knowledge that he cannot be held financially responsible for any children that might result from such unions.[11]

The state might also assert an interest in preventing the disruption of the legal family unit. By assuring that a married man is not obligated to support his illegitimate children, so the argument runs, the state guarantees that his legitimate children may fully draw upon his resources.

The circularity of this argument is apparent. The very question at issue is whether the state may discriminate between legitimate and illegitimate children in creating paternal support obligations. While the interest of the state in providing for the security of the family unit is unquestioned, it may do so only in ways that do not invidiously discriminate in violation of the Fourteenth Amendment. Mere repetition of the fact that illegitimate children are not a recognized part of the legal family and are not now entitled to paternal support is not sufficient to justify the state provision to that effect.

Moreover, the flagrant overbreadth and underinclusiveness of the illegitimacy classifications in the Texas child support scheme exposes the emptiness of the claim that the

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[11] In the same University of Illinois survey, seventy-five percent of those polled *agreed* with the following statement: "Making fathers financially responsible for their illegitimate children would seem to be a more effective way to discourage promiscuous sexual intercourse than imposing no obligation or a limited support obligation on fathers of illegitimate children." Krause, *supra* note 10 at 171.

discrimination involved here is meant to preserve the fin
cial integrity of the legal family unit.[12] The classification
overbroad in that *unmarried* men who have no family
protect are as free from a support obligation to their il
gitimate children as are married men who are fathers
legitimate children. If the purpose of the discriminato
classification is to insure the financial viability of the le
family unit, only men who are fathers of legitimate ch
dren should be freed from a support obligation towa
their illegitimate children. The alleged state interest
not served by removing this burden from unmarried m
The discriminatory classification is overbroad in a seco
way in that under Texas law a man is not required to su
port his illegitimate children even if he has the financ
means to do so without stinting his legitimate family.

The classification is also underinclusive. Married *wom*
in Texas are under an obligation to provide for the su
port of all their children, legitimate or illegitimate.
fathers are freed from an obligation to support their il
gitimate children on the rationale that they are thereby al
to support their legitimate children more fully, the sa

---

[12] While the Equal Protection Clause does not require that
asserted state goal be achieved by lines drawn "with mathemati
nicety," the Court has not hesitated to examine whether and
what degree the classes actually created do in fact achieve
asserted purpose. As the Chief Justice recently explained in *Re*
v. *Reed*, 404 U.S. 71, 75, 76 (1971), "The Equal Protection Cla
. . . den[ies] to States the power to legislate that different tre
ment be accorded to persons . . . on the basis of criteria wholly un
lated to the objective of that statute. A classificiation . . . 'must r
upon some ground of difference having a fair and substantial re
tion to the object of the legislation, so that all *persons simila*
circumstanced shall be treated alike.' *Royster Guano Co.* v. *V*
ginia, 253 U.S. 412, 415 (1920)." (Emphasis added.) Classificati
that are over or underinclusive obviously do not treat persons si
ilarly situated alike.

rationale should apply to mothers. A mother's support of an illegitimate child interferes with her ability to support her legitimate children as much as a father's.[13]

The over and underinclusive nature of the classification underscores the fact that it is not related to any state interest in the financial integrity of the family. Rather, it simply and unjustifiably imposes a penalty upon the helpless children involved, furthering the already substantial stigma of illegitimacy which they bear.

The Ohio Supreme Court in *Baston* v. *Sears, supra,* note 9, upheld a discriminatory classification similar to that involved here on the theory that a married father voluntarily assumes the obligation to support the children of his marriage as an incident of the nuptial contract. The Court justified the discrimination against illegitimate children by an alleged state interest in preserving the right of a father to choose whether or not to support his children by marrying their mother. 239 N.E.2d at 63-64.

This contention is also unpersuasive, as the dissent in this case below shows:

> The fictitious nature of the consensual nature of the father's support obligation is apparent. The obliga-

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[13] Texas might seek to defend the distinction between maternal and paternal support obligations by arguing that *Levy* dealt exclusively with the mother-child relationship and therefore requires the mother, but not the father, to equally support legitimate and illegitimate children. Cf., *Baston* v. *Sears,* 239 N.E.2d 62 (Ohio 1968). The *Weber* Court disposed of any such distinction when it held that illegitimate children may recover workmen's compensation for the death or injury of their *father.*

Such a classification based on sex is also an invidious discrimination unrelated to any reasonable state interest, and therefore independently violates the Equal Protection Clause. Cf. *Reed* v. *Reed,* 404 U.S. 71 (1971).

> tion to support legitimate children would exist eve
> if the man . . . expressly stated, with the full acqui
> escence of the bride, that he did not assume suc
> obligation. If such a repudiation is ineffective, the
> consent is irrelevant. . . . The obligation is impose
> by law, irrespective of consent. 466 S.W.2d at 46.

As in Ohio, the obligation of a Texas father to suppor his children when he marries their mother is imposed b law, and the absence of an obligation of a father to sup port his illegitimate children is sanctioned by law. A we have shown, there is no compelling or even cognizabl state interest to justify this discrimination.

CONCLUSION

For the reasons stated, the judgment of the Court o Civil Appeals of Texas should be reversed.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 71-575

LINDA GOMEZ, *et al.*,

Appellants,

v.

FRANCISCO OCASIO PEREZ,

Appellee.

ON APPEAL FROM THE COURT OF CIVIL APPEALS FOR THE FOURTH SUPREME JUDICIAL DISTRICT OF TEXAS

BRIEF OF AMICUS CURIAE IN SUPPORT OF THE JUDGMENT BELOW

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BRIEF OF AMICUS CURIAE IN SUPPORT OF THE JUDGMENT BELOW

INTEREST OF *AMICUS CURIAE*

This brief is submitted pursuant to the Court's invitation of June 29, 1972 to the undersigned to brief and argue this case as amicus curiae in support of the judgment below.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The issue here is the constitutionality of Tex. Fam. Code §4.02 (1969)[1] (The Statute). Tex. Penal Code Ann. arts. 602, 602a (1952), which provide criminal sanctions for a parent's failure to support his children, are not involved, because Appellant has sought only a civil recovery of child support.

QUESTIONS PRESENTED

1. Whether the Equal Protection Clause of the Fourteenth Amendment compels the State of Texas to allow paternity suits.

2. Whether the Due Process Clause of the Fourteenth Amendment compels the State of Texas to allow paternity suits.

3. Whether a paternity cause of action should be authorized by legislation rather than judicial interpretation.

STATEMENT OF THE CASE

Appellants' Statement of the Case is correct, but incomplete. The following more fully develops the factual setting: the Appellee was not represented by

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[1] The text of §4.02 is: "Each spouse has the duty to support his or her minor children. The husband has the duty to support the wife, and the wife has the duty to support the husband when he is unable to support himself. A spouse who fails to discharge a duty of support is liable to any person who provides necessaries to those to whom support is owed."

counsel at the trial on the merits;[2] the Appellant mother was not cross-examined;[3] yet, all findings of fact were based *solely* on the mother's testimony.[4]

SUMMARY OF ARGUMENT

1. *Equal Protection.* Certainly, the Equal Protection Clause of the Fourteenth Amendment prohibits invidious discrimination by state action. It is fundamental, however, that a state may adopt legislation creating classifications and applying different treatment to them if such action bears a rational relationship to a valid legislative purpose.[5] Texas' authorization of support suits for legitimate, but not illegitimate children, advances valid state interests by avoiding those aspects inherent in paternity litigation which offend personal dignity, abuse the judicial process and often severely damage blameless citizens.

> Blackmail and perjury flourish, accusation is often tantamount to conviction, decades of support obligation are decided upon in minutes of court time and indigent defendants usually go without counsel or a clear understanding of what is involved.[6]

The only effective way to avoid such undesirable consequences is to eliminate their cause--suits based upon disputed paternity. Texas' decision not to allow such

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[2]Record at 110.

[3]Record at 127-131.

[4]*Id.*

[5]*Morey v. Doud,* 354 U.S. 457, 77 S.Ct. 1344, 1 L.Ed.2d. 1485 (1957).

[6]H. Krause, Illegitimacy: Law and Social Policy 108 (1971).

actions, at the cost of some economic relief to illegitimates, does rationally relate to a valid legislative purpose. Since "the Fourteenth Amendment gives the federal courts no power to impose upon the States their views of what constitutes wise economic or social policy,"[7] this Court should not discard Texas' rational and reasonable policy judgment on the basis of what may be different moral or social priorities.

In the area of differing treatment of illegitimates, this Court has made pertinent the inquiry of whether the State action in question erects an insurmountable barrier to the child's obtaining support from its father.[8] Texas has not created such a barrier inasmuch as an illegitimate child can obtain support from its father through voluntary support arrangements, legitimation by marriage, and suits based upon "common law" marriage.

2. *Due Process.* State legislation which is reasonable and not arbitrary does not violate the Fourteenth Amendment Due Process Clause.[9] The Texas child support scheme, which does not permit paternity suits, is reasonable in light of the deplorable consequences of such litigation which have been consistently experienced in other jurisdictions.

3. *Legislative Action.* The Statute provides that "each spouse has the duty to support his or her minor children." Since this provision is limited to "spouses", it necessarily applies only to a father's legitimate children.

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[7] *Dandridge v. Williams*, 397 U.S. 471, 486, 90 S.Ct. 1153, 1162, 25 L.Ed.2d 491, 502 (1970).

[8] *Labine v. Vincent*, 401 U.S. 532, 91 S.Ct. 1017, 28 L.Ed.2d 288 (1971).

[9] *Williamson v. Lee Optical of Oklahoma*, 348 U.S. 483, 75 S.Ct. 461, 99 L.Ed. 563 (1955).

If this Court declares the Statute unconstitutional, any Texas father could avoid his existing child support obligation. If this Court concludes, without obviating the entire provision, that the Statute imposes a duty on a father to support his illegitimate, as well as legitimate children, it would simply be creating a paternity cause of action. Such a development by judicial interpretation could not supply the procedural safeguards required to minimize potential abuses. Accordingly, if this Court determines that Texas must allow paternity suits, it should afford the Texas Legislature sufficient time to authorize such litigation by statute, and allow Appellee the opportunity on remand to defend this action under the revised system.

ARGUMENT

I.

THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT DOES NOT COMPEL TEXAS TO ALLOW PATERNITY SUITS.

A. Texas' authorization of support suits only for legitimate children does not violate the Equal Protection Clause because it promotes the valid state interest of avoiding the evils inherent in paternity litigation.

> The Equal Protection Clause of the Fourteenth Amendment does not take from the State the power to classify in the adoption of police laws, but admits the excercise of a wide scope of discretion in that regard, and *avoids what is done only when it is without any reasonable basis and therefore is purely arbitrary.*[10]

The Statute applying as it does only to "spouses", authorizes support suits only on behalf of legitimate children. Accordingly, the Texas Legislature has relegated the legitimate and illegitimate children within its borders into separate classifications which are accorded different rights to require economic support from their fathers. Appellants urge that this classification violates the Equal Protection Clause of the Fourteenth Amendment. Yet, neither the Appellants, nor those who argue in their behalf, have considered those factors which cause this classification to be rational, and, therefore (in accordance with this Court's above quoted description of permissible

[10] *Morey v. Doud*, 354 U.S. 457, 463, 77 S.Ct. 1344, 1349, 1 L.Ed.2d 1485, 1490 (1957) (emphasis added).

state action) constitutional. In addition, "one who assails the classification in such a law must carry the burden of showing that it does not rest upon any reasonable basis, but is essentially arbitrary."[11] Appellants have not discharged this burden.

Appellee respectfully submits, as hereinafter developed, that the Statute's constitutionality is to be judged by its rational relationship to a valid state interest, and that pursuant to this test, it is constitutional.

> *The Equal Protection Clause permits different treatment of legitimate and illegitimate children which bears a rational relationship to a valid legislative purpose.*

Validity under the Equal Protection Clause of States' statutory classifications is to be determined by whether the classification "bear[s] some rational relationship to a legitimate state purpose", even when the Court is dealing with basic economic rights.[12] For instance, in holding constitutional a welfare payment ceiling which disregarded family size and need, the Court stated:

> To be sure, the cases cited, and many others enunciating this fundamental standard under the Equal Protection Clause [rational relationship to a valid legislative purpose] have in the main involved state regulation of business or industry. *The administration of public welfare assistance,* by contrast, *involves the most basic economic needs of impoverished human beings.* We recognize the

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[11] *Morey v. Doud,* 354 U.S. 457, 464, 77 S.Ct. 1344, 1349, 1 L.Ed.2d 1485, 1490 (1957).

[12] *Weber v. Aetna Casualty & Surety Company,* ____U.S.____, ____, 92 S. Ct. 1400, 1405, ____L.Ed.2d____, ____(1972).

> dramatically real factual difference between the cited cases and this one, *but we can find no basis for applying a different constitutional standard.*[13]
>
> It is important to note that there is no contention that the Maryland regulation is infected with a racially discriminatory purpose or effect such as to make it inherently suspect.[14]

Dandridge is closely analogous to the case at bar. In both, statutes which limit the availability of support for dependent children were challenged as violative of the Equal Protection Clause. The instant case, like *Dandridge*, involves basic economic needs. In neither case was the classification based on race. Hence, the rational relationship test, as applied in *Dandridge*, should also obtain here.

Although this Court has indicated that it will examine them more closely, this fundamental standard has been applied to classifications of children's economic rights based upon legitimacy.[15] This Court has never held, as advocates for Appellants suggest, that a classification based upon legitimacy is so "suspect" as to be justified only by a "compelling" state interest. Appellee acknowledges that *Levy* contained a reference to this

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[13] *Dandridge v. Williams*, 397 U.S. 471, 485, 90 S.Ct. 1153, 1162, 25 L.Ed.2d 491, 502 (1970) (emphasis added).

[14] *Id.* at n. 17.

[15] *Weber v. Aetna Casualty & Surety Company*, ____U.S.____, ____, 92 S. Ct. 1400, 1405, ____L.Ed.2d____, ____(1972). See *Levy v. Louisiana*, 391 U.S. 68, 71, 88 S.Ct. 1509, 1511, 20 L.Ed.2d 436, 439 (1968); *Glona v. American Guarantee and Liability Insurance Company*, 391 U.S. 73, 75, 88 S. Ct. 1515, 1516, 20 L.Ed.2d 441, 443 (1968); *Labine v. Vincent*, 401 U.S. 532, 538, 551, 91 S.Ct. 1017, 1021, 1027, 28 L.Ed. 2d 288, 293, 301 (1971).

Court's extreme sensitivity to basic civil rights;[16] and that in *Weber*, discrimination against illegitimates under a workmen's compensation statute was found to be "justified by no legitimate state interest, compelling or otherwise."[17] But, as the language of Mr. Justice Brennan's dissent in *Labine* clearly suggests,[18] this Court has never held to be "suspect", classifications based upon legitimacy. To the contrary, this Court has consistently applied the rational relationship test, even when dealing with rights of illegitimate children. Appellee respectfully submits that it should not deviate from that standard in evaluating the Statute.

The critical inquiry is: What State interest is promoted by Texas' preclusion of paternity suits?

> *Texas' authorization of support suits only for legitimate children serves the legislative purpose of avoiding the coercion, corruption, perjury and personal humiliation which are unavoidable aspects of paternity suits.*

An examination of the available evidence yields the inevitable conclusion that paternity suits are at best, undesirable–at worst, intolerable. Sidney B. Schatkin, author of the leading treatise on paternity proceedings, observed:

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[16] *Levy v. Louisiana*, 391 U.S. 68, 71, 88 S.Ct. 1509, 1511, 20 L.Ed.2d 436, 439 (1968).

[17] *Weber v. Aetna Casualty & Surety Company*, ___ U.S. ___, ___, 92 S. Ct. 1400, 1407, ___ L.Ed.2d ___, ___ (1972).

[18] *Labine v. Vincent*, 401 U.S. 532, 547-548, 551, 91 S.Ct. 1017, 1025, 1027, 28 L.Ed.2d 288, 298-299, 301 (1971).

> Paternity offers a fertile field for blackmail, extortion and "shakedown" on the part of an unscrupulous woman. The average normal woman, of course, is not unscrupulous, nor will she be guilty of extortion. Nevertheless, a normal single woman who becomes pregnant is trapped–desperate, virtually compelled to designate a father for her expected child.[19]

Furthermore, Professor Harry D. Krause, an articulate and well-known advocate of paternity actions, has concluded:

> In sum, current paternity prosecution practice in many metropolitan areas is abhorrent. Blackmail and perjury flourish, accusation is often tantamount to conviction, decades of support obligation are decided upon in minutes of court time and indigent defendants usually go without counsel or a clear understanding of what is involved.[20]

Empirical confirmation of these findings has been supplied by a study of paternity proceedings in San Francisco courts:

> So bitter are these conflicts, and so punishing for all the parties, that some scholars in the social work field have wondered whether society is wise in attempting to identify the father of an illegitimate child and exacting financial payments from him. The courtroom presentation of a bastardy case is at best a sordid spectacle.[21]

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[19]Schatkin, *Should Paternity Cases be Tried in a Civil or Criminal Court?* 1 Crim. L. Rev. (N.Y.) 18, 22 (1954).

[20]H. Krause, Illegitimacy: Law and Social Policy 108 (1971).

[21]Virtue, Family Cases in Court 36-37 (1956) quoted by C. Foote, R. Levy and F. Sander, Cases and Materials on Family Law 63 (1966).

As the foregoing reflects, paternity litigation adversely affects the mother and child, the alleged father, and the judicial system. Texas' preclusion of such actions is permissible within the ambit of this Court's holding in *Weber*, and does not offend the Fourteenth Amendment by its differing treatment of mothers and their illegitimates.

Effects on the mother and child.

Paternity suits can impose upon mother and child a degrading and humiliating ordeal. A knowledgeable observer recounted the torturous process of one paternity trial as follows:

> An initial issue in a contested case is whether the defendant had sexual intercourse with the complainant mother at about the time of conception. The defense, if unable to dispute the allegation that intercourse did occur, may seek to show that other men also enjoyed the complainant's favors. In order that the judges on their high bench may hear the testimony above the distracting noises of a bustling courtroom, each witness is constantly admonished to speak loudly and clearly. Counsel have been advised to "ask questions in a voice that carries" and to stand in as remote a spot as possible in order to draw audible answers from "the unwed mother on the witness stand [who] is usually a timid and reticent witness." Then, with counsel and witness vying with one another to be heard in the far corners of a mammoth chamber packed with onlookers, answers are sought to questions of which the following sequence is aptly illustrative:
>
> "When did you start having acts of sexual intercourse with the defendant?"
>
> "How often per week from that time on did you have sexual intercourse with the defendant?"

> "When was the last act of intercourse you had with the defendant before the baby was born?"
>
> A 27-year old complainant, attended in court by her 4-year old child, is asked: "How old were you when you first had intercourse with the defendant?" She lowers her head and mumbles a response. A judge complains that he cannot understand her answer. "It was when I was thirteen," she then bellows, mindful of the necessity of "speaking so the judges can hear you."
>
> And so it goes.
>
> The wretched chronicles that unfold before the Court are likely to thrill none but the depraved.[22]

Admittedly, not every unwed mother will submit herself and her child to such an ordeal by instituting a paternity action, and every paternity suit may not follow the foregoing scenario, but the incentive to use similar tactics is inherent in all paternity litigation. The mother's desire for retribution and pressure from her vindictive parents can be expected to produce many sequels to this courtroom tragedy.

Counsel for the mother will be motivated to employ any device to elicit jury sympathy. The most dramatic ploy is to present the child in the courtroom, in full view of the jury, as evidence of paternity by the purported physical resemblance which it bears to the Defendant. The probative value of such evidence is dubious, yet it is indisputable that exposure of an impressionable child to the courtroom spectacle so prevalent in paternity suits may cause it permanent and significant damage.

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[22] Gellhorn, Children and Families in the Courts of New York City 192-209 (1954) quoted by C. Foote, R. Levy and F. Sander, Cases and Materials on Family Law 62 (1966).

Similarly, every defense attorney will be impelled to counter the plaintiff's tactics by discrediting the often crucial testimony of the mother. Although the following may not accurately describe the course of every paternity trial, it is exemplary of the lengths to which recognized treatise writers suggest defense counsel should go to impeach the unwed mother:

> On her direct examination, the mother's recital of her relations with the defendant will be brief. . . . Counsel for the defendant should endeavor to draw from her a more detailed and complete picture of the relations that actually existed. The mother's character may be attacked by the following line of questioning:
>
> Q: Did you have sexual relations with the defendant on the occasion of your first meeting?
>
> Q: In what specific portion of the premises did the acts occur? (Counsel should not assume that the acts occurred in a room; they may have occurred on the roof or in a hallway.)
>
> Q: Was any other person present in the room where the act occurred? (The fact may be that another woman, or couple, may have been in the room or even in the same bed where the act occurred. The court has had cases where two couples had relations in the same bed at the same time, one of the women becoming complainant in the affiliation case.)
>
> Q: Have you had sexual relations with any other man or boy?
>
> Q: Even before you met the defendant? (This question may be important if the mother answered the preceding question in the negative, but with a mental reservation limiting her answer to a time subsequent to meeting the defendant.)

Q: Do you have any other child born out of wedlock?

Q: Did you have sexual relations with any other man or boy during pregnancy?

Q: Have you ever been engaged to be married?

Q: Are you now keeping company with a man whom you expect to marry?

Q: Are you now seeing some man or boy with whom you are having sexual relations?

Q: Has any other man or boy assisted you financially during your pregnancy?

Q: Is some other man or boy aiding you financially at the present time?[23]

Texas clearly promotes a valid state interest by protecting unwed mothers and their children from the cruel debasement they could unwittingly suffer in paternity litigation.

Effect on the alleged father.

Because paternity litigation can so stigmatize alleged fathers, it often subjects innocent men to harassment and extortion. For example, a study based on blood tests revealed that two out of every five accused men were not actually the fathers of the children in question.[24] However, the ill effects of paternity litigation are not limited to harassment of men who dispute their paternity. Another study revealed that 18% of a group of men who voluntarily admitted paternity were not in fact

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[23] Schatkin, Disputed Paternity Proceedings 762-763 (4th Ed. 1967).

[24] Sussman, *Blood Grouping Tests–A Review of 1000 Cases of Disputed Paternity*, 40 Am. J. Clinical Pathology 38 (1963) quoted by H. Krause, Illegitimacy: Law and Social Policy 107-108 (1971).

the fathers of the children in question.[25] The disrepute which even a false accusation of illegitimate paternity can bring caused these men to succumb to obligations not fairly theirs, making them innocent victims of a system conceived by people determined to protect illegitimate children regardless of the cost. "Of course many of these 'fathers' did not admit their *paternity*—they merely admitted they doubted that they had a fair chance in court."[26] The mere threat of a paternity suit is a potent weapon for extortion.

Unfortunately, the judicial process often compounds, rather than prevents, this corruption so prevalent in paternity suits. The defendant is distinctly disadvantaged.

> In many of the paternity cases reaching appellate courts it seems reasonably clear that no more than lip service, if that, has been accorded either the stricter standard of proof required or the presumptions applicable in certain factual settings; with the result, we fear, that often the determination represents the trial court's tacit finding of preponderant evidence merely and the application of the Judge's subjective judgment. *Thus, in some cases, although not necessarily in this, a putative father nominated by the woman, sometimes long after conception and sometimes only after insistance by the welfare authorities, may be held responsible and the burden of a continuing financial obligation imposed upon him, without adequate judicial evaluation of the record, particularly of the*

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[25] Sussman & Schatkin, *Blood Grouping Tests in Undisputed Paternity Proceedings*, 164 J.A.M.A. 249-50 (1957) quoted by H. Krause, Illegitimacy: Law and Social Policy 108 (1971).

[26] *Id.* at n. 12.

accuser's testimony, and of any attempted impeachment of her character as respects her veracity and, in some cases, her promiscuity. This result seems to follow with some regularity if the respondent fails to testify or if he takes the stand and is candid enough to admit intimate relations at some time or another. *Either course may be damning to him as affording at least a superficial basis for an affirmative finding against him.*[27]

The protection of its citizens from the harsh and discriminatory potential of paternity suits must be considered a valid state interest. Texas has achieved that protection through the only feasible means—entitling children to paternal support on the basis of their legitimacy. Such action cannot be deemed irrational.

Effects on the administration of justice.

Wholesale perjury in paternity litigation perverts the judicial process. A study in which parties to paternity suits were given lie detector tests disclosed the shocking fact that *"93% of the tested parties lied in some respect when they testified in court as to their sexual relationship!"*[28] Although the infallibility of a lie detector test is questionable, "following their lie detector tests, approximately 82% of the paternity complainants, alleged fathers, and witnesses confessed to the lie detector examiner that they committed perjury when testifying in court!"[29] For example, "over 40% of the tested mothers confessed to having had sexual intercourse with others during the conception period."[30] An

[27] *Gray v. Rose*, 30 A.D.2d 138, 290 N.Y.S 2d 647, 649 (1968) (emphasis added).

[28] Arther & Reid, *Using the Lie Detector Technique to Determine the Truth in Disputed Paternity Cases*, 45 J. Crim. L.C. & P.S. 213, 215 (1954) (emphasis added).

[29] *Id.*

[30] *Id.*

independent study in California confirmed the Arther & Reid findings. In 361 cases where the mother claimed that the defendant was the only man with whom she had intercourse during the conception period, *144 women lied.*[31] Unquestionably, the amelioration of the "social opprobrium suffered by these hapless [illegitimate] children" is a laudable goal. However, the use of paternity suits as a means to attain that goal is condemnable. As the Illinois Family Study Commission stated in its 1969 report:

> The investigation and information obtained by the Commission on paternity law & practice leads to the inescapable conclusion that coercion, corruption, perjury and indifference to the rights of the individual defendant pervade in the day-to-day practice in this area of judicial proceedings.[32]

Surely, this Court can understand the justifiable reluctance of the Texas Legislature to sanction a cause of action which encourages the use of such reprehensible practices—even if some feel that to do so would tend to improve the plight of illegitimates in our society. Paternal support of illegitimates cannot coexist with the right of protection from the recognized evils of paternity fights. Texas has had to choose which of these desirable conditions is more important for its citizenry. Although its decision may be subject to sincere social and psychological question, it is not irrational. The discrimination which its decision necessarily entailed, regardless of the priority selected, is not invidious.

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[31] Schatkin, Disputed Paternity Proceedings 64-65 (Supp. 1971).

[32] Family Study Commission, State of Illinois, Report & Recommendations 55 (1969).

Recognition of Texas' valid interest.

This Court has recently recognized explicitly the interest a state can have in avoiding the problems attendant to litigating disputed issues of paternity.

> Finally, we are mindful that States have frequently drawn arbitrary lines in workmen's compensation and wrongful death statutes to facilitate potentially difficult problems of proof. Nothing in our decision would impose on state court systems a greater burden in this regard. By limiting recovery to dependents of the deceased, *Louisiana substantially lessens the possible problems* of locating illegitimate children and *of determining uncertain claims of parenthood. Our decision fully respects Louisiana's choice on this matter. . . . The State interest in minimizing problems of proof is not significantly disturbed by our decision.*[33]

A decision here that the Statute is unconstitutional would necessarily disturb Texas' interest "in minimizing problems of proof" in determining paternity, a result never before effected by this Court's decisions involving paternity.[34] Yet that is the interest which has prompted Texas to avoid paternity disputes, not only through the Statute, but throughout its statutes affecting the economic rights of children. As the Court in *American*

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[33] *Weber v. Aetna Casualty & Surety Company*, ___ U.S. ___, ___, 92 S.Ct. 1400, 1406, ___ L.Ed.2d ___, ___ (1972) (emphasis added).

[34] Both *Levy v. Louisiana* and *Glona v. American Guarantee and Liability Insurance Company*, involved the *mother*-child relationship, while *Weber v. Aetna Casualty & Surety Company*, was defended on the basis of dependency, not paternity. In *Labine v. Vincent*, the father had publicly acknowledged the illegitimate child as his own.

General Insurance Co. v. Alexander[35] indicated with respect to Texas Workmen's Compensation laws, Texas accords illegitimates the same rights as legitimates to the greatest extent possible without litigating disputed issues of paternity.

> In cases involving the father as a beneficiary or as the deceased employee, the difficulty of establishing with certainty the relationship of father and child made it practically necessary that the legislature, in phrasing the terms of the Workmen's Compensation law, and that the courts in construing it, exclude him from the law's consideration. No such impediment exists as to the unfortunate mother and the question of her identity as the mother is solved as easily and readily as though her child had been born in wedlock.[36]

Indicative of Texas' overall effort not to discriminate unreasonably against illegitimates is the fact that it deems legitimate those children whose parents' actions in many respects tend to confirm paternity. For example, legitimacy is presumed as to children of: faulty ceremonial marriages which are later remedied;[37] common law marriages;[38] putative marriages;[39] marriages deemed null at law;[40] parents who marry after the child's birth;[41] and

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[35] 216 S.W.2d 997 (Tex. Civ. App.—Beaumont 1948, writ ref'd).

[36] *Id.* at 998.

[37] *Lee v. Smith*, 18 Tex. 141 (1856).

[38] *Ray v. Thompson*, 261 S.W.2d 195 (Tex. Civ. App.—Galveston 1953, no writ).

[39] *Cameron v. Cameron*, 103 S.W.2d 464 (Tex. Civ. App.—Galveston 1937, writ ref'd).

[40] Tex. Prob. Code Ann. §42 (1956).

[41] *Id.*

annulled marriages, even if the marriage occurred after conception.[42] Even when illegitimate, a child is accorded all the rights of a legitimate vis-a-vis its mother.[43] As such, an illegitimate can sue for wrongful death;[44] recover Workmen's Compensation benefits;[45] inherit;[46] and is treated as the "legitimate child of his mother for the purpose of determining homestead rights, the distribution of exempt property, and the making of family allowances."[47] Texas, contrary to Louisiana, does not "punish illegitimate children for the misdeeds of their parents."[48] It, in fact, promotes their interest in every way possible without sanctioning paternity suits.

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[42] *Home of Holy Infancy v. Kaska*, 397 S.W.2d 208 (Tex. Sup. 1966).

[43] *American General Insurance Co. v. Alexander*, 216 S.W.2d 997, 998 (Tex. Civ. App.–Beaumont 1948, writ ref'd).

[44] *Galveston, H. & S. A. Ry. Co. v. Walker*, 106 S.W. 705 (Tex. Civ. App.–Galveston 1907, writ ref'd).

[45] *American General Insurance Co. v. Alexander*, 216 S.W.2d 997 (Tex. Civ. App.–Beaumont 1948, writ ref'd).

[46] Tex. Prob. Code Ann. §42 (1956).

[47] *Id.*

[48] *Labine v. Vincent*, 401 U.S. 557, 91 S.Ct. 1030, 28 L.Ed.2d 288 (1971). The two instances in which Appellants contend Texas has authorized litigation of paternity, rape and homestead exemptions (Appellants' Brief at 24), are inapposite. *Jaffe v. Deckard*, 261 S.W. 390 (Tex. Civ. App.–Amarillo 1924, writ ref'd), was an isolated decision, totally unrelated to Texas' statutory scheme, which, utilizing a tort concept of damages, awarded support for a child conceived during a rape. The homestead example involved determination of a family group, not dependent upon natural paternity.

As the Court so strongly indicated in *Weber* that it would not, it should not here destroy the means by which Texas avoids all of the undesirable aspects, including the "problems of proof," inherent in paternity litigation. As it did in *Weber*, this Court should "fully respect [Texas'] choice on this matter."

Reasonableness of different treatment of parents.

Despite the limitation of the Statute to "spouses", mothers have a common law duty in Texas to support their illegitimate children.[49] Appellants contend that this discriminates against women as well as illegitimate children. Such discrimination, however, is not arbitrary. It is necessitated by all of the reasons heretofore discussed regarding the classification based upon legitimacy. It is also reasonable in two additional respects. First, the mother, to the exclusion of the father, is the natural guardian of an illegitimate child.[50] The duty of support is an attendant obligation to the right of custody. Second, since maternity is undisputed in most instances, requiring support from the mother does not entail the myriad of evils inescapable in imposing that obligation upon the father.[51]

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[49] *Home of Holy Infancy v. Kaska*, 397 S.W.2d 208 (Tex. Sup. 1966).

[50] *Blue v. Holman*, 245 S.W. 722 (Tex. Civ. App.–Texarkana 1922, writ dism'd).

[51] Appellants argue that "to give a mandatory preference to members of either sex over members of the other, [merely to accomplish the elimination of hearings on the merits,] is to make the very kind of arbitrary legislative choice forbidden by the Equal Protection Clause." . . . *Reed v. Reed*, 404 U.S. 71, 76, 92 S.Ct. 251, 254, 30 L.Ed.2d 225, 230, (1971). (Appellants' Brief on the Merits at 21.) Yet, a hearing to determine who should administer an estate, as in *Reed*, in no way compares to a paternity suit accompanied by corruption, extortion, perjury, and indifference to individual rights which are unavoidable in paternity litigation.

In conclusion, Appellee does not ask this Court to decide that the Statute is wise, that it best fulfills the social objectives that Texas might ideally espouse or that a more just and humane system could not be devised. Predictably, "conflicting claims of morality and intelligence are raised by opponents and proponents of almost every measure," certainly including support for illegitimate children. However, "the Fourteenth Amendment gives the federal courts no power to impose upon the States their views of what constitutes wise economic or social policy."[52] Appellee does urge this Court to recognize the adverse consequences experienced by other jurisdictions which permit paternity suits. In view of their experience, Texas' refusal to authorize such litigation is clearly rational; as such, it does not violate the Equal Protection Clause.

B. Texas has not erected an insurmountable barrier to an illegitimate child's obtaining support from its natural father.

This Court has indicated in decisions affecting the rights of illegitimates, that a relevant factor in determining the constitutionality of statutory classifications based upon legitimacy is whether the state has erected an "insurmountable barrier" to illegitimates' obtaining the same rights as legitimates. The Court in *Labine* upheld different treatment of illegitimates in intestacy laws because the State had not created an insurmountable barrier to the illegitimate child's sharing in its father's estate.[53] The Court reasoned that since the

[52] *Dandridge v. Williams*, 397 U.S. 471, 486, 90 S.Ct. 1153, 1162, 25 L.Ed.2d 491, 502 (1970).

[53] *Labine v. Vincent*, 401 U.S. 557, 91 S.Ct. 1030, 28 L.Ed.2d 288 (1971).

intestate could have executed a will devising property to the illegitimate child, the state did not preclude the child from sharing in its father's estate. In *Weber*, this Court referred to *Labine* and considered whether an insurmountable barrier existed there. The Court noted that the father was prevented from acknowledging the illegitimate child with the result that, being unacknowledged, the illegitimate was absolutely precluded from any means of receiving rights equal to legitimates.[54] Since Texas does not affirmatively prevent a father from supporting his illegitimate child, the State has not created an insurmountable barrier, and, under that test, the Statute does not violate the Equal Protection Clause. Clearly, Texas permits a father to support his illegitimate child. First, a father is allowed to contribute voluntarily to the support of an illegitimate child. Second, the father may legitimate the child by marriage to the mother. Third, a duty of support may be imposed on the basis of a common law marriage.

Voluntary Support.

In *Labine*, this Court emphasized that by simply executing a will, the father could have left a portion of his property to his illegitimate child.[55] Similarly, in Texas, a father may support his illegitimate child through voluntary payments. Just as Louisiana does not forbid testamentary disposition to illegitimates, Texas imposes no legal barrier to a father's supporting his illegitimate children. The efficacy of voluntary support arrangements

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[54] *Weber v. Aetna Casualty & Surety Company*, ___ U.S. ___, 92 S.Ct. 1400, ___ L.Ed.2d ___ (1972).

[55] *Labine v. Vincent*, 401 U.S. 532, 91 S.Ct. 1017, 28 L.Ed.2d 288 (1971).

was established by a recent study which discovered that over 50% of fathers of illegitimate offspring contribute to the support for mothers and children, and of these 95% do so voluntarily, without legal action.[56]

Appellants incorrectly contend that *C. v. W.*[57] poses an insurmountable barrier to voluntary support for illegitimates. The Court of Civil Appeals there held that a specific contract for support of an illegitimate child was unenforceable against the father for lack of consideration. The Court did not hold that a father cannot voluntarily support an illegitimate child.

Legitimation by Marriage.

As was true in *Labine*, a father may, under Texas Law, legitimate his illegitimate child by marrying the mother.[58] The legal relationship thus created between a father and his legitimated child is the same as that of father and legitimate child, including the obligation of support.[59]

Common Law Marriage.

Texas recognizes informal or common law marriages:

> In any judicial . . . proceeding, the marriage of a man and a woman may be proved by evidence that . . . they agreed to be married, and after the agreement they lived together in this State as husband and wife and they represented to others that they were married.[60]

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[56] Sauber & Rubenstein, *Experiences of the Unwed Mother as a Parent* 54-56, 81-82 (1965) quoted by C. Foote, R. Levy and F. Sander, Cases and Materials on Family Law 17 (Supp. 1971).

[57] 480 S.W.2d 474 (Tex. Civ. App.–Amarillo 1972, no writ).

[58] Tex. Prob. Code Ann. §42 (1956).

[59] *Home of Holy Infancy v. Kaska*, 397 S.W.2d 208 (Tex. Sup. 1966).

[60] Tex. Fam. Code §1.91 (1969).

> . . . the agreement of the parties to marry may be inferred if it is proved that they lived together as husband and wife and represented to others that they were married.[61]

Under the appropriate circumstances, a ceremonially unwed mother could sue for child support on the theory that the child was legitimate–born in common law wedlock.

Thus, since an illegitimate child may receive support from its father by voluntary payments, legitimation by marriage, or a suit based on common law marriage, Texas imposes no insurmountable barrier to the illegitimate child's receiving support from its father.

II.

THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT DOES NOT COMPEL TEXAS TO ALLOW PATERNITY SUITS.

Appellants' contention that preclusion of paternity litigation violates the Due Process Clause of the Fourteenth Amendment is devoid of merit. Both the analysis employed and the authority cited are inapplicable to the case at bar.

Unquestionably, the Due Process Clause permits rational state legislation:

> The law need not be in every respect logically consistent with its aims to be constitutional. It is enough that there is an evil at hand for correction, and that it might be thought that the particular legislative measure was a rational way to correct it.[62]

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[61] Tex. Fam. Code §1.91 (1969).

[62] *Williamson v. Lee Optical of Oklahoma,* 348 U.S. 483, 487-488, 75 S.Ct. 461, 464, 99 L.Ed. 563, 572 (1955)

Appellants recognize "the general rule is that state legislation is permissible if it is not unreasonable, arbitrary, or capricious, and the means selected have a real and substantial relation to the object sought to be attained."[63]

In this case, Texas' preclusion of paternity litigation is certainly rational. As previously described, experience with paternity suits in other jurisdictions has been abysmal. Paternity litigation imposes an intolerable burden on the mother and child, results in blackmail of alleged fathers, and corrupts the administration of justice with widespread perjury. Surely, efforts to avoid such evils must be characterized as reasonable—not arbitrary.

Appellants rely on *Stanley v. Illinois*[64] to buttress the "Due Process" argument. Such reliance is misplaced. True, *Stanley* held a presumption that unwed fathers are unfit parents violative of the Due Process Clause, because it created an insurmountable barrier to an unwed father's obtaining custody of his child. Yet, as demonstrated earlier, no insurmountable barrier prevents an illegitimate child from obtaining support from its father in Texas. *Stanley* is inapposite here. Because the preclusion of paternity suits is rational, and no insurmountable barrier forbids a father from supporting his illegitimate offspring, the Texas child support scheme does not violate the Due Process Clause.

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[63] Appellants' Brief on the Merits at 22.

[64] ___U.S.___, 92 S.Ct. 1208, ___L.Ed.2d___ (1972).

III.

IF THE COURT REQUIRES TEXAS TO PERMIT PATERNITY SUITS, IT SHOULD ALLOW THE TEXAS LEGISLATURE TO PROVIDE ESSENTIAL SAFEGUARDS, AND SHOULD AFFORD APPELLEE THE OPPORTUNITY TO DEFEND THIS ACTION WITH FAIR NOTICE OF HIS RIGHTS AND OBLIGATIONS.

Should this Court decide that the Fourteenth Amendment compels Texas to authorize paternity suits, Appellee urges this Court to render its ruling in a form which will ensure the validity of current child support orders and minimize the deleterious effects of such a ruling upon the Texas Judicial System.

To hold simply that the Statute is unconstitutional, the Court would obviate the statutory basis for all child support in Texas. There is no separate statute which discriminates against illegitimate children. The Statute under attack governs child support generally. As Judge Hughes noted in the companion case to this:

> To hold that the Equal Protection Clause should apply would invalidate a statutory provision of critical importance to Texas' carefully drawn Family Code.[65]

Surely, a holding which would allow fathers to evade current child support orders would be counter-productive.

On the other hand, a holding by this Court that the word "spouse" in the Statute includes parents of illegitimate, as well as legitimate children, aside from

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[65] *Linda R.S. v. Richard D.*, Order of Dismissal, Civil No. 3-4336-B (N.D. Tex. 1972).

refuting the clear wording of the Statute, would severely disrupt the administration of justice in Texas. Such a holding would be tantamount to authorization of a paternity cause of action by judicial interpretation, and all the disadvantages of paternity litigation experienced in other jurisdictions would ensue without control. Only through carefully drafted legislation is there any possibility of minimizing the attendant evils hereinbefore discussed.[66]

Appellee suggests that if the Fourteenth Amendment compels Texas to authorize paternity suits, then this Court should afford the Texas Legislature sufficient time to implement such a cause of action by statute. In *Reynolds v. Simms*,[67] this Court expressed approval of such an approach:

> The District Court in this case acted in a most proper and commendable manner. It initially acted wisely in declining to stay the impending primary election in Alabama, and properly refrained from acting further until the Alabama Legislature had been given an opportunity to remedy the admitted discrepancies in the State's legislative apportionment scheme, while initially stating some of its views to provide guidelines for legislative action. And it correctly recognized that legislative reapportionment is primarily a matter for legislative consideration and determination, and that judicial relief becomes appropriate only when a legislature fails to reapportion according to federal constitutional requisites in a timely fashion after having had an adequate opportunity to do so.

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[66]H. Krause, Illegitimacy: Law and Social Policy (1971).

[67]377 U.S. 533, 586, 84 S.Ct. 1362, 1394, 12 L.Ed.2d 506, 541 (1964).

Other courts, too, have awaited legislative action for correction of constitutional violations. In *Rodriquez v. San Antonio Independent School District*,[68] a three-judge court held the Texas school financing system unconstitutional, yet stayed the mandate for a period of two years to enable the Legislature to restructure the school financing system.

Relief in this form would have the additional advantage of treating Appellee fairly; and certainly his situation is of equal concern to this Court as that of Appellants. Appellee was sued on a cause of action disallowed in Texas both by statute and by rulings of the State Supreme Court.[69] Under those circumstances, the trial court erred in proceeding to trial in defiance of the Legislature and the higher Court.[70] The charges should have been dismissed as a matter of law, in which event the constitutional contentions would have been as well preserved. Justifiably, Appellee did not appear at the trial, probably on the advice of counsel, and of course did not defend the charges against him. Because of that decision, made on the basis of clear Texas Law, Appellee should not be precluded from his day in court, if the rules are changed now. By staying its mandate until the Texas Legislature concludes its next session, during which a paternity bill is already scheduled for consideration,[71]

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[68]Civil No. 68-175-S.A. (W.D. Tex., December 23, 1971), Prob. Juris. Noted, 40 U.S.L.W. 3576 (June 6, 1972).

[69]*Home of Holy Infancy v. Kaska*, 397 S.W.2d 208 (Tex. Sup. 1966).

[70]*Swilley v. McCain*, 374 S.W.2d 871 (Tex. Sup. 1964).

[71]At the 1969 Session, the Texas Legislature considered a paternity statute proposed by the Department of Public Welfare. Committee action resulted in radical amendments, and the bill was passed providing that only the Texas Department of Public Welfare would be able to prosecute paternity suits, and then only when

the Court can afford Appellee a full opportunity on remand to present his evidence with fair notice of his rights and obligations.

CONCLUSION

Paternity litigation demeans mothers and children, abuses alleged fathers, and perverts the judicial process, all of which effects emanate from the essential issue in every paternity suit: Is the defendant the father of the child? In quest of an affirmative answer, plaintiff's counsel employ sympathy-generating techniques such as

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governmental funds had been used to support the illegitimate child. Governor Preston Smith vetoed the bill on June 15, 1969. During the next regular Session in 1971, the Texas Legislature considered an omnibus bill intended to complete the Texas Family Code by the addition of Title II (Parent-Child Relationship). The proposed legislation consisted of 45 chapters, one of which (Chapter 13) related to paternity. (A copy of Chapter 13, together with Chapter 11, which in §11.17 refers to preservation of records, and Chapter 12, which describes the Parent-Child Relationship, is attached to this Brief as Appendix A for the Court's information.) The bill was referred to Senate and House Judiciary Committees for consideration, but never reached the floor for a vote. The proposed chapter, in recognition of its potential for bad faith, extortion and harmful publicity, included certain provisions designed to protect (at least in part) the alleged father from abuses. For example, the proposed statute included provisions to the following effects: (i)a pretrial procedure requiring the Court to screen cases *in camera* before spreading the matter on public record; (ii) requiring the mother and child to submit to blood tests to determine whether paternity is possible; (iii) if the suit is dismissed at the pretrial stage or if non-paternity is established, sealing the Court records and filing them in strict confidence in the Central Record File in Austin; and (iv) providing a limitations period of one year. According to representatives of the Texas Legislative Council, a bill with very similar provisions will be introduced in the next regular Session.

involving the child in the sordid trial proceedings. In hopes of securing a negative response, defense counsel parade the details of the plaintiff's sex life before the jury. The very act of naming a man as defendant in a paternity action holds such potential for scandal and embarrassment that the mere threat of suit is a powerful weapon for harassment and extortion. Finally, such suits invariably entail wholesale perjury by parties and witnesses alike. Unquestionably, a constitutional requirement that Texas authorize paternity suits would significantly disturb Texas' interest in minimizing problems of proof.

For all of the foregoing, §4.02 of the Texas Family Code meets the criteria of constitutionality. It rationally promotes valid state interests. As such, it should not be destroyed by contrary judicial concepts of social or moral propriety. Appellee respectfully urges that the decision of the Court of Civil Appeals for the Fourth Supreme Judicial District of Texas be affirmed. In the alternative, if the judgment below is reversed, Appellee prays that the mandate be stayed until the adjournment of the next regular session of the Texas Legislature following the date of decision, and that the matter then be remanded for trial.

Respectfully submitted,

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APPENDIX A

Title 2. PARENT AND CHILD
Subtitle A. The Parent-Child Relationship and the Suit Affecting the Parent-Child Relationship
Chapter 11. General Provisions

Sec. 11.01. Definitions
Sec. 11.02. Suit Authorized; Scope of Suit
Sec. 11.03. Who May Bring Suit
Sec. 11.04. Venue
Sec. 11.05. Continuing Jurisdiction
Sec. 11.06. Transfer of Proceedings
Sec. 11.07. Commencement of Suit
Sec. 11.08. Contents of Petition
Sec. 11.09. Citation
Sec. 11.10. Guardian Ad Litem
Sec. 11.11. Temporary Orders
Sec. 11.12. Social Study
Sec. 11.13. Jury
Sec. 11.14. Hearing
Sec. 11.15. Findings
Sec. 11.16. Decree
Sec. 11.17. Central Record File
Sec. 11.18. Costs
Sec. 11.19. Appeal

Sec. 11.01. DEFINITIONS. As used in this subtitle and Subtitle D of this code, unless the context requires a different definition:

(1) "Child" or "minor" means a person under 21 years of age who is not and has not been married or who has not had his disabilities of minority removed for general purposes. "Adult" means any other person.

(2) "Court" means the district court, court of domestic relations, juvenile court, or other court having jurisdiction of a suit under this subtitle.

(3) "Parent" means the mother, a father as to whom the child is legitimate, an adoptive mother or father, or the father of an illegitimate child who has voluntarily legitimated the child or has had his paternity established under this subtitle, but does not include a parent as to whom the parent-child relationship has been terminated.

(4) "Parent-child relationship" means the rights, privileges, duties, and powers existing between a parent and child as provided by Section 12.04 of this code.

(5) "Suit affecting the parent-child relationship" means a suit brought under this subtitle in which the appointment of a managing conservator or a possessory conservator, access to or support of a child, or establishment or termination of the parent-child relationship is sought.

(6) "Managing conservatorship" means the relationship between a child and a managing conservator appointed by court order under this subtitle.

(7) "Authorized agency" means a public social agency authorized to care for children or to place children for adoption, or a private association, corpora-

tion, or person approved for that purpose by the State Department of Public Welfare through a license, certification, or other means.

Sec. 11.02. SUIT AUTHORIZED; SCOPE OF SUIT. (a) A suit affecting the parent-child relationship may be brought as provided in this subtitle.

(b) One or more matters covered by this subtitle may be determined in the suit. The court, on its own motion, may require the parties to replead in order that any issue affecting the parent-child relationship may be determined in the suit.

Sec. 11.03. WHO MAY BRING SUIT. A suit affecting the parent-child relationship may be brought by any person, including the child (through a representative authorized by the court), any agency of the state or of a political subdivision of the state, and any authorized agency.

Sec. 11.04. VENUE. (a) Except as otherwise provided in this subtitle, a suit affecting the parent-child relationship shall be brought in the county where the child resides.

(b) A suit in which adoption is sought may be brought in the county where the child resides, the petitioners reside, or if the child is placed for adoption by an authorized agency, in the county where the authorized agency is located.

(c) A suit in which determination of paternity is sought shall be brought in the county where the alleged father resides.

(d) A child resides in the county where his parents (or parent if only one parent is living) reside, except that:

(1) if a managing conservator has been appointed, the child resides in the county where the managing conservator resides;

(2) if a guardian of the person has been appointed by order of a county or probate court and a managing conservator has not been appointed, the child resides in the county where the guardian of the person resides;

(3) if the parents of the child do not reside in the same county and neither a managing conservator nor a guardian of the person has been appointed, the child resides in the county where the parent having care and control of the child resides;

(4) if the child is under the care and control of an adult other than a parent and neither a managing conservator nor a guardian of the person has been appointed, the child resides where the adult having care and control of the child resides;

(5) if a guardian or custodian of the child has been appointed by order of a court of another state or nation, the child resides in the county where the guardian or custodian resides; or

(6) if it appears that the child is not under the care and control of an adult, the child resides where he is found.

Sec. 11.05. CONTINUING JURISDICTION. (a) Except as provided in Subsection (b) of this section, when a court acquires jurisdiction of a suit affecting the parent-child relationship, that court retains continuing jurisdiction of all matters provided for under this subtitle in connection with the child, and no other court has jurisdiction of a suit affecting the parent-child relationship with regard to that child except on transfer as provided in Section 11.06 of this code.

(b) A final decree of adoption ends a court's continuing jurisdiction over the child, and any subsequent suit affecting the child shall be commenced as though the child had not been the subject of a suit for adoption or any other suit affecting the parent-child relationship prior to the adoption.

Sec. 11.06. TRANSFER OF PROCEEDINGS. (a) If venue is improperly laid in the court in which a suit affecting the parent-child relationship is filed, and no other court has continuing jurisdiction of the suit, the court, on the timely motion of any party other than the petitioner, and on a showing that venue is proper in another county, shall transfer the proceeding to the county where venue is proper.

(b) If a petition or a motion to modify a decree is filed in a court having continuing jurisdiction of the suit, the court, on the timely motion of any party, and on a showing that venue is proper in another county or that a suit for dissolution of marriage has been filed in another court, shall transfer the proceeding to the county where venue is proper or to the court where the suit for dissolution of the marriage is pending. However, if the basis of the motion is that the child resides in another county, the court may deny the motion if it is shown that the child has not resided in that county for at least six months.

(c) For the convenience of the parties and witnesses and in the interest of justice, the court, on the timely motion of any party, may transfer the proceeding to a proper court in any other county in the state.

(d) A motion under Subsection (a), (b), or (c) of this section must be made on or before the day on which answer is required.

(e) Each party to the suit is entitled to 10 days' notice and a hearing on the transfer which shall be held within 30 days after the day of filing the motion to transfer. Only evidence pertaining to venue shall be taken at the hearing. An order transferring or refusing to transfer the proceeding is not appealable.

(f) The court transferring a proceeding shall send to the proper court in the county to which transfer is made the complete file in the suit affecting the child, certified copies of all entries in the minutes, and a certified copy of any decree of dissolution of marriage issued in a suit joined with the suit affecting the parent-child relationship.

(g) A court to which a transfer is made becomes the court of continuing jurisdiction, and all proceedings in the suit are continued as if it were brought there originally.

Sec. 11.07. COMMENCEMENT OF SUIT. (a) A suit affecting the parent-child relationship shall be commenced by the filing of a petition as provided in this chapter.

(b) On the commencement of a suit affecting the parent-child relationship in a court which has not already acquired continuing jurisdiction, the court shall request from the State Department of Public Welfare identification of the court which last had jurisdiction of the child in a suit affecting the parent-child relationship. The court shall identify the child by name, birthdate, and place of birth. If another court is determined to have continuing jurisdiction over the parent-child relationship, the court in which the suit was commenced shall dismiss the suit without prejudice.

Sec. 11.08. CONTENTS OF PETITION. (a) The petition and all other documents in a proceeding brought under this subtitle (except a suit for adoption of an adult) shall be entitled "In the interest of _____, a child." In a suit in which adoption of a child is sought, the style shall be, "In the interest of a child."

(b) The petition must be verified by the petitioner and must include to the best of the petitioner's information and belief:

(1) a statement that no other court has continuing jurisdiction of the suit;

(2) the name, sex, place and date of birth, and place of residence of the child, except that if adoption of a child is sought, the name of the child may be omitted;

(3) the full name, age, and place of residence of the petitioner and his relationship to the child or the fact that no relationship exists;

(4) the names, ages, and place of residence of the parents, except in a suit in which adoption is sought;

(5) the name and place of residence of the managing conservator, if any;

(6) the names and places of residence of the guardians of the person and estate of the child, if any;

(7) the names and places of residence of possessory conservators or other persons, if any, having access to the child under an order of the court;

(8) a full description and statement of value of all property owned or possessed by the child;

(9) a statement describing what action the court is requested to make concerning the child and the statutory grounds upon which the request is made; and

(10) any other information required by other provisions of this subtitle.

Sec. 11.09. CITATION. (a) The following persons are entitled to service of citation on the commencement of a suit affecting the parent-child relationship:

(1) the managing conservator, if any;

(2) possessory conservators, if any;

(3) persons, if any, having access to the child under an order of the court;

(4) persons, if any, required by law or by order of a court to provide for the support of a child;

(5) the guardian of the person of the child, if any;

(6) the guardian of the estate of the child, if any;

(7) the parents, except in a suit in which adoption is sought; and

(8) the alleged father in a suit in which paternity is sought to be established.

(b) Citation must be given as in other civil cases, except that citation may be by registered or certified mail, return receipt requested. The filing of the returned receipt indicating delivery by registered or certified mail to the proper person shall be prima facie evidence of the fact of service.

Sec. 11.10. GUARDIAN AD LITEM. (a) In any suit in which termination of the parent-child relationship is sought, the court shall appoint a guardian ad litem to represent the interests of the child, unless the child is a petitioner. In any other suit under this subtitle, the court may appoint a guardian ad litem. The managing conservator may be appointed guardian ad litem if he is not a parent of the child or a person petitioning for adoption of the child and if he has no personal interest in the suit.

(b) A guardian ad litem may be appointed to represent any other person entitled to service of citation under the

provisions of Section 11.09 of this code if the person is incompetent or a child.

Sec. 11.11. TEMPORARY ORDERS. In a suit affecting the parent-child relationship, the court may make any temporary order for the safety and welfare of the child.

Sec. 11.12. SOCIAL STUDY. (a) In a suit affecting the parent-child relationship, the court may order the preparation of a social study into the circumstances and condition of the child and of the home of any person seeking managing conservatorship or possession of the child.

(b) In a suit in which adoption is sought, the social study authorized by this section is mandatory.

(c) The social study may be made by any state agency, including the State Department of Public Welfare, or any local or private agency, or any person appointed by the court. The social study shall be made according to criteria established by the court.

(d) The agency or person making the social study shall file its findings and conclusions with the court on a date set by the court. The date may not be later than 60 days after the day the study is ordered, and in cases of adoption it may not be later than 60 days after the day the petition is filed. The report shall be made a part of the record of the suit.

Sec. 11.13. JURY. (a) In a suit affecting the parent-child relationship, except a suit in which adoption is sought, any party may demand a jury trial.

(b) The verdict of the jury is binding on the court except with respect to the issues of managing conserva-

torship, possession, and support of and access to a child, on which the verdict is advisory only.

Sec. 11.14. HEARING. (a) Except as otherwise provided in this subtitle, proceedings shall be as in civil cases generally.

(b) On the agreement of all parties to the suit, the court may limit attendance at the hearing to only those persons who have a direct interest in the suit or in the work of the court.

(c) The court may compel the attendance of witnesses necessary for the proper disposition of the petition, including a representative of the agency making the social study, who may be compelled to testify.

(d) A record shall be made as in civil cases generally unless waived by the parties with the consent of the court.

(e) The rules of evidence apply as in other civil cases.

(f) When information contained in a report, study, or examination is before the court, the person making the report, study, or examination is subject to both direct examination and cross-examination as in civil cases generally.

(g) The hearing may be adjourned from time to time.

(h) In any suit in which a social study is ordered, the court shall set a time and place for a hearing, which must be held not more than 60 days after the date the study was ordered; except that in adoption cases the hearing shall be held not more than 60 days after the day the petition was filed. On or before the day set for hearing, the court, for good cause shown, may change the time of the hearing to any day after the day on which the report

of the social study is presented to the court. The person or agency appointed to make the social study is entitled to at least five days' notice of the change.

Sec. 11.15. FINDINGS. The court's findings shall be based on a preponderance of the evidence under rules generally applicable to civil cases.

Sec. 11.16. DECREE. The decree in a suit affecting the parent-child relationship shall recite the names and addresses of the parties to the suit, the basis of the court's jurisdiction, and relevant facts on which the findings and orders are based.

Sec. 11.17. CENTRAL RECORD FILE. (a) Except as provided by Subsection (b) of this section, the clerk of each court having jurisdiction of suits affecting the parent-child relationship shall transmit to the State Department of Public Welfare a copy of the decree entered in each suit affecting the parent-child relationship, together with the name and all prior names, birthdate, and place of birth of the child. The department shall maintain these records in a central file according to the name, birthdate, and place of birth of the child, and the court which rendered the decree.

(b) On entry of a decree of adoption, or on dismissal of a suit to establish paternity under Section 13.05 of this code, or on entry of an order that an alleged father is not the father of a child, the clerk of the court shall transmit to the department the complete file in the case, including all pleadings, papers, studies, and records in the suit other than the minutes of the court. When the department receives the complete file, it shall close the records concerning that child; and except for statistical

purposes, it shall not disclose any information concerning the prior proceedings affecting the child. Any subsequent inquiries concerning the child shall be handled as though the child had not been previously the subject of a suit affecting the parent-child relationship. On the receipt of additional records concerning a child who has been the subject of an adoption decree or a suit to establish paternity, a new file shall be made and maintained as other records required by this section.

(c) On the written request of a court or of an attorney, the department shall identify the court which last had jurisdiction of the child in a suit affecting the parent-child relationship, or state that the child has not been the subject of a suit affecting the parent-child relationship. The child shall be identified in the request by name, birthdate, and place of birth. The department shall transmit this information within 10 days after the day the request is received and may charge a reasonable fee to cover the cost of this service.

(d) The records required to be maintained by the department are confidential, and no person is entitled to access to or information from these records except as provided by this section or on an order of a district court of Travis County for good cause.

Sec. 11.18. COSTS. (a) In any proceeding under this subtitle, the court may award costs as in other civil cases. Reasonable attorney's fees may be taxed as costs.

(b) The court may authorize the commencement or defense of any suit or proceeding under this subtitle without prepayment of fees and costs or security therefor by a person who files with the clerk his affidavit stating that he is unable to pay the costs or give security therefor.

(c) No separate filing fee is required in any suit affecting the parent-child relationship joined with a suit for dissolution of marriage under Title 1 of this code.

Sec. 11.19. APPEAL. (a) Appeals from orders, decrees, or judgments entered in suits affecting the parent-child relationship, when allowed under this section or under other provisions of law, shall be as in civil cases generally.

(b) An appeal may be taken by any party to a suit affecting the parent-child relationship from an order, decree, or judgment:

(1) entered under Chapter 13 of this code dismissing with prejudice a suit to determine paternity; or determining that an alleged father is or is not the father of a child;

(2) entered under Chapter 14 of this code appointing or refusing to appoint a managing conservator; appointing or refusing to appoint a possessory conservator; ordering or refusing to order payments for support of a child; or modifying any such order previously entered;

(3) entered under Chapter 15 of this code terminating or refusing to terminate the parent-child relationship; or appointing a managing conservator;

(4) entered under Chapter 16 of this code granting or refusing an adoption.

(c) An appeal from an order, judgment, or decree, with or without a supersedeas bond, does not suspend the order, decree, or judgment unless suspension is ordered by the court entering the order, decree, or judgment. The appellate court, on a proper showing, may permit the order, decree, or judgment to be suspended.

(d) On the motion of the parties or on its own motion the appellate court in its opinion may identify the parties by fictitious names or by their initials only.

CHAPTER 12. THE PARENT-CHILD RELATIONSHIP

Sec. 12.01. Relation of Child to Mother
Sec. 12.02. Relation of Child to Father
Sec. 12.03. Artificial Insemination
Sec. 12.04. Rights, Privileges, Duties, and Powers of Parent

Sec. 12.01. RELATION OF CHILD TO MOTHER. A child is the legitimate child of his mother.

Sec. 12.02. RELATION OF CHILD TO FATHER. (a) A child is the legitimate child of his father if the child is born or conceived before or during the marriage of his father and mother.

(b) A child is the legitimate child of his father if at any time his father and mother have attempted to marry in apparent compliance with the laws of this state or another state or nation, although the attempted marriage is or might be declared void for any reason other than the disability of the wife by reason of an existing marriage.

(c) A child is the legitimate child of his father if the father's paternity is established under the provisions of Chapter 13 of this code.

Sec. 12.03. ARTIFICIAL INSEMINATION. (a) If a husband consents to the artificial insemination of his wife, any resulting child is the legitimate child of both of them. The consent must be in writing and must be acknowledged unless the husband is the sole donor.

(b) If a woman is artificially inseminated, the resulting child is not the child of the donor unless he is the husband.

Sec. 12.04. RIGHTS, PRIVILEGES, DUTIES, AND POWERS OF PARENT. Except as otherwise provided by judicial order, the parent of a child has the following rights, privileges, duties, and powers:

(1) the right to have physical possession of the child and to establish its legal domicile;

(2) the duty of care, control, protection, moral and religious training, and reasonable discipline of the child;

(3) the duty to support the child, including providing the child with clothing, food, shelter, medical care, and education;

(4) the duty to manage the estate of the child;

(5) the right to the services and earnings of the child;

(6) the power to consent to marriage, to enlistment in the armed forces of the United States, and to medical, psychiatric, and surgical treatment;

(7) the power to represent the child in legal action and to make other decisions of substantial legal significance concerning the child;

(8) the power to receive and give receipt for payments for the support of the child and to hold or disburse any funds for the benefit of the child;

(9) the right to inherit from and through the child; and

(10) any other right, privilege, duty, or power existing between a parent and child by virtue of law.

CHAPTER 13. PATERNITY

Sec. 13.01. Time Limitation on Suit
Sec. 13.02. Pretrial Proceedings: Blood Tests
Sec. 13.03. Pretrial Proceedings: Appointment of Experts
Sec. 13.04. Pretrial Proceedings: Conference
Sec. 13.05. Pretrial Proceedings: Effect of Blood Tests
Sec. 13.06. Evidence at Trial
Sec. 13.07. Settlement
Sec. 13.08. Decree
Sec. 13.09. Effect of Decree Establishing Paternity
Sec. 13.10. Voluntary Legitimation
Sec. 13.11. Statement of Paternity
Sec. 13.12. Effect of Statement of Paternity
Sec. 13.13. Validation of Prior Statements
Sec. 13.14. Managing Conservatorship, Support, Etc.
Sec. 13.15. Birth Certificate

Sec. 13.01. TIME LIMITATION ON SUIT. Except as provided by Section 13.10(c) of this code, a suit in which a determination of paternity is sought must be brought before the child is one year old, or the suit is barred.

Sec. 13.02. PRETRIAL PROCEEDINGS: BLOOD TESTS. (a) When the alleged father appears in a suit in which a determination of paternity is sought, the court shall order the mother, father, and child to submit to blood tests. If the appearance is before the birth of the child, the court shall order the blood tests made as soon as medically practical after the birth.

(b) If the petitioner refuses to submit to the blood test, the court shall dismiss the suit. If the defendant refuses to submit to the blood test, the fact of refusal may be introduced as evidence as provided in Section 13.06(d) of this code.

Sec. 13.03. PRETRIAL PROCEEDINGS: APPOINTMENT OF EXPERTS. (a) The court may appoint two or more experts qualified as examiners of blood types to make the blood tests. The court may determine the number and qualifications of the experts and shall prescribe the arrangements for conducting the tests.

(b) The court may fix reasonable fees for the court-appointed examiners and may require the fees to be paid by any or all of the parties or by the State Department of Public Welfare in the amounts and in the manner directed, or the court may tax all or part or none of the fees as costs in the suit.

(c) A party may employ other qualified examiners of blood tests. The court may order blood samples made available to these examiners if requested.

Sec. 13.04. PRETRIAL PROCEEDINGS: CONFERENCE. (a) After completion of the blood tests, the court shall order all parties to appear, either in person or by counsel, at a pretrial conference. The court shall call its appointed examiners to testify in person or by deposition about their tests and findings. A party may call other qualified examiners of blood tests to testify.

(b) Witnesses called by the court are the court's witnesses, and witnesses called by a party are that party's witnesses. The court and the parties may examine and cross-examine all witnesses.

(c) All evidence presented at the pretrial conference is a part of the record of the case.

Sec. 13.05. PRETRIAL PROCEEDINGS: EFFECT OF BLOOD TESTS. (a) At the conclusion of the pretrial conference, if the court finds that the tests show by clear

and convincing evidence that the alleged father is not the father of the child, the court shall dismiss the suit with prejudice.

(b) If the court fails to find that the blood tests show by clear and convincing evidence the alleged father is not the father of the child, the court shall set the suit for trial.

Sec. 13.06. EVIDENCE AT TRIAL. (a) Unless otherwise permitted by the court on a showing of good cause, a party may call to testify on the results of the blood tests only those experts who testified at the pretrial conference.

(b) A witness called by a party at the trial is that party's witness.

(c) If the blood tests show the possibility of the alleged father's paternity, the court may admit this evidence if offered at the trial.

(d) Evidence of a refusal by the defendant to submit to a blood test is admissible to show only that the defendant is not precluded from being the father of the child.

Sec. 13.07. SETTLEMENT. The child must be a party to a settlement agreement with the alleged father. The child shall be represented in the settlement agreement by a guardian ad litem appointed by the court. The court must approve any settlement agreement, dismissal, or nonsuit.

Sec. 13.08. DECREE. (a) On a verdict of the jury, or on a finding of the court if there is no jury, that the alleged father is the father of the child, the court shall issue an order designating the alleged father as the father of the child.

(b) On a verdict of the jury, or on a finding of the court if there is no jury, that the alleged father is not the father of the child, the court shall issue an order declaring this finding.

Sec. 13.09. EFFECT OF DECREE ESTABLISHING PATERNITY. The effect of a decree designating the alleged father as the father of the child is to create the parent-child relationship between the father and the child as if the child were born to the father and mother during marriage.

Sec. 13.10. VOLUNTARY LEGITIMATION. (a) The father of a child not the legitimate child of another man may institute a suit for a decree designating him as the father of the child unless the parent-child relationship has been terminated under Chapter 15 of this code. With the consent of the mother or the managing conservator, if one has been appointed, and the court, and on the filing of a statement of paternity executed by the father and submitted with the petition, and after notice to the wife, if any, of the father of the child, the court shall enter a decree declaring the child to be the child of the father.

(b) If a statement of paternity is filed with the State Department of Public Welfare, the father, the mother, or the department may institute a suit for a decree establishing the child as the legitimate child of the person executing the statement. On the consent of the mother, the managing conservator, or the court, and on the filing of the statement of paternity with the petition, the court shall enter a decree declaring the child to be the legitimate child of the person executing the statement of paternity.

(c) A suit for voluntary legitimation must be instituted before the child is two years old, or the suit is barred.

Sec. 13.11. STATEMENT OF PATERNITY. The statement of paternity authorized to be used in Section 13.10 of this code must be executed by the father of the child as an affidavit and witnessed by two credible adults. The affidavit must clearly state that the father acknowledges the child as his child, that he and the mother, who is named in the affidavit, were not married at the time of conception of the child or at any subsequent time, that the child is not the legitimate child of another man, and that the child is entitled to support from the father. The statement must be executed before a person authorized to administer oaths under the laws of this state.

Sec. 13.12. EFFECT OF STATEMENT OF PATERNITY. (a) A statement of paternity executed as provided in Section 13.11 of this code is prima facie evidence that the child is the child of the person executing the statement and that the person has an obligation to support the child.

(b) If the father's address is unknown or he is outside the jurisdiction of the court at the time a suit is instituted under Section 13.10 of this code, his statement of paternity, in the absence of controverting evidence, is sufficient for the court to enter a decree establishing his paternity of the child.

Sec. 13.13. VALIDATION OF PRIOR STATEMENTS. A statement acknowledging paternity or an obligation to support a child which was signed by the father before January 1, 1972, is valid and binding even

though the statement is not executed as provided in Section 13.11 of this code and is not filed with the State Department of Public Welfare or with the court.

Sec. 13.14. MANAGING CONSERVATORSHIP, SUPPORT, ETC. (a) In a suit in which a determination of paternity is sought, the court may provide for the managing conservatorship, possession, and support of and access to the child.

(b) In addition to the payments authorized by Section 14.05 of this code, the court may order the father to pay reasonable attorney's fees incurred in the paternity suit.

(c) A payment ordered under Subsection (b) of this section is enforceable as provided in Section 14.09 of this code.

Sec. 13.15. BIRTH CERTIFICATE. On determination of paternity under this chapter, the clerk of the court, unless directed otherwise by the court, shall transmit a copy of the decree to the State Registrar of Vital Statistics, and the registrar shall substitute for the original a new birth certificate based on the decree in accordance with the provisions of the laws which permit the correction or substitution of birth certificates for adopted children or children legitimated by the subsequent marriage of their parents and in accordance with the rules and regulations promulgated by the State Department of Health.

NOTICE: This opinion is subject to formal revision before publication in the preliminary print of the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D.C. 20543, of any typographical or other formal errors, in order that corrections may be made before the preliminary print goes to press.

SUPREME COURT OF THE UNITED STATES

No. 71–575

Linda Gomez, Individually and as Next Friend of Zoraida Gomez, Appellant, *v.* Francisco Ocasio Perez.	On Appeal from the Court of Civil Appeals for the Fourth Supreme Judicial District of Texas.

[January 17, 1973]

PER CURIAM.

The issue presented by this appeal is whether the laws of Texas may constitutionally grant legitimate children a judicially enforceable right to support from their natural fathers and at the same time deny that right to illegitimate children.

In 1969, appellant filed a petition in Texas District Court seeking support from appellee on behalf of her minor child. After a hearing, the state trial judge found that appellee is "the biological father" of the child, and that the child "needs the support and maintenance of her father," but concluded that because the child was illegitimate "there is no legal obligation to support the child and the Plaintiff take nothing." The Court of Civil Appeals affirmed this ruling over the objection that this illegitimate child was being denied equal protection of law. 466 S. W. 2d 41. The Texas Supreme Court refused application for a Writ of Error, finding "No reversible error." We noted probable jurisdiction. 408 U. S. 920.

In Texas, both at common law and under the statutes of the State, the natural father has a continuing and primary duty to support his legitimate children. See

Lane v. *Phillips*, 6 S. W. 610, 611 (Tex. 1887); Vernon's Tex. Codes Ann., Family Code § 4.02 (1970) (husband's duty).[1] That duty extends even beyond dissolution of the marriage, Vernon's Tex. Civ. Stat., Art. 4639a; *Hooten* v. *Hooten*, 15 S. W. 2d 141 (Tex. Civ. App. 1929), and is enforceable on the child's behalf in civil proceedings and, further, is the subject of criminal sanctions. Tex. Penal Code § 602. The duty to support exists despite the fact that the father may not have custody of the child. *Hooten* v. *Hooten*, *supra*. The Court of Civil Appeals has held in this case that nowhere in this elaborate statutory scheme does the State recognize any enforceable duty on the part of the biological father to support his illegitimate children and that absent a statutory duty to support, the controlling law is the Texas common law rule that illegitimate children, unlike legitimate children, have no legal right to support from their fathers. See also *Home of the Holy Infancy* v. *Kaska*, 397 S. W. 2d 208 (Tex. 1965); *Lane* v. *Phillips*, *supra*, at 611; *Bjorgo* v. *Bjorgo*, 391 S. W. 2d 528 (Tex. Civ. App. 1965). It is also true that fathers may set up illegitimacy as a defense to prosecutions for criminal nonsupport of their children. See *Curtin* v. *State*, 238 S. W. 2d 187 (Tex. Crim. App. 1951); *Beaver* v. *State*, 256 S. W. 929 (Tex. Crim. App. 1923).

In this context, appellant's claim, on behalf of her daughter, that the child has been denied equal protection of the law is unmistakably presented. Indeed, at argument here, the attorney for the State of Texas, appearing as *amicus curiae*, conceded that but for the fact that

[1] Section 4.02 became effective after the commencement of appellant's suit, but the provision is identical (except for punctuation) to its predecessor, Tex. Civ. Stat., Husband and Wife, Art. 4614, in 1 Tex. Gen. & Special Laws, c. 309, at 736 (60th Legislature, Reg. Sess. 1967). Section 4.02 was enacted as part of a codification of Texas family law.

this child is illegitimate she would be entitled to support from appellee under the laws of Texas.[2]

We have held that under the Equal Protection Clause of the Fourteenth Amendment a State may not create a right of action in favor of children for the wrongful death of a parent and exclude illegitimate children from the benefit of such a right. *Levy* v. *Louisiana*, 391 U. S. 68 (1968). Similarly, we have held that illegitimate children may not be excluded from sharing equally with other children in the recovery of workmen's compensation benefits for the death of their parent. *Weber* v. *Aetna Casualty & Surety Co.*, 406 U. S. 164 (1972).[3] Under these decisions, a State may not invidiously discriminate against illegitimate children by denying them substantial benefits accorded children generally. We therefore hold that once a State posits a judicially enforceable right on behalf of children to needed support from their natural fathers there is no constitutionally sufficient justification for denying such an essential right

[2] Tr. of Oral Arg., at 24. There was some question at argument whether the statutory scheme relating to paternal support of children was properly drawn into question in the state courts. In the circumstances of this case, we need not resolve the question. First, the State of Texas asserts no prejudice from appellant's apparent failure to explicitly draw attention to the individual statutes that make up the so-called Texas rule regarding support of legitimate and illegitimate children. On the contrary, the State asserted here that it was prepared to meet appellant's constitutional attack on its statutes on the merits. Tr. of Oral Arg., at 28. Second, under our cases, "the unrestricted notation of probable jurisdiction is to be understood as a grant of the writ" of certiorari on "nonappealable" issues presented in the case. *Mishkin* v. *New York*, 383 U. S. 502, 512 (1966). Appellant's federal claim, which was rejected in the state courts, that her child was being denied equal protection of law, is, therefore, properly before us in any event.

[3] See also *Davis* v. *Richardson*, 342 F. Supp. 588 (D. Conn.), aff'd, 409 U. S. — (1972); *Griffin* v. *Richardson*, 346 F. Supp. 1226 (D. Md.), aff'd, 409 U. S. — (1972).

to a child simply because her natural father has not married her mother. For a State to do so is "illogical and unjust." *Weber* v. *Aetna Casualty & Surety Co., supra,* at 175. We recognize the lurking problems with respect to proof of paternity. Those problems are not to be lightly brushed aside, but neither can they be made into an impenetrable barrier that works to shield otherwise invidious discrimination. *Stanley* v. *Illinois,* 405 U. S. 645, 656–657 (1972); *Carrington* v. *Rash,* 380 U. S. 89 (1965).

The judgment is reversed and the case remanded for further proceedings not inconsistent with this opinion.

It is so ordered.

SUPREME COURT OF THE UNITED STATES

No. 71–575

Linda Gomez, Individually and as Next Friend of Zoraida Gomez, Appellant, *v.* Francisco Ocasio Perez.	On Appeal from the Court of Civil Appeals for the Fourth Supreme Judicial District of Texas.

[January 17, 1973]

MR. JUSTICE STEWART, with whom MR. JUSTICE REHNQUIST joins, dissenting.

This case came here as an appeal, on the representation that the Texas courts had sustained the constitutionality of § 4.02, c. 4, of the Texas Family Code and Articles 602 and 602a of the Texas Penal Code, over a challenge to those statutes under the Equal Protection Clause of the Fourteenth Amendment. We noted probable jurisdiction, 408 U. S. 920, to consider whether the alleged discrimination between legitimate and illegitimate children in terms of the support obligations of their biological fathers denied equal protection to illegitimate children under the principles of *Weber* v. *Aetna Cas. & Surety Co.*, 406 U. S. 164, *Glona* v. *American Guarantee and Liability Insurance Co.*, 391 U. S. 73, and *Levy* v. *Louisiana*, 391 U. S. 68.

Upon the submission of briefs and oral argument, it became clear that neither statute had been the actual subject of litigation in the courts of Texas. Hence this is not properly an appeal under 28 U. S. C. § 1257 (2). I would, therefore, dismiss the appeal for want of jurisdiction, and treat "the papers whereon the appeal was taken" as a petition for writ of certiorari. 28 U. S. C. § 2103.

The parties were not prepared to submit this case as one challenging the common law treatment of illegitimates in Texas, and failed to provide this Court with a sufficient understanding of Texas law with respect to such matters as custodial versus noncustodial support obligations, legitimation, common law marriage, and the effect of a Texas statute, § 4.02 of the Family Code, which became law after this litigation had begun. With the issues so vaguely drawn and the alleged discriminations so imprecise, I would dismiss the writ of certiorari as improvidently granted.